No. 492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, a New York Corporation, not individually but as Trustee under Trust Indenture dated April 28, 1931, between Tessie A. Cohn and James A. Cole, as Settlors,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, a municipal corporation, and ALBERT W. HARRIS, HARRY C. HAGERTY, HARRY M. ADDINSELL, M. H. MacLEAN and THOMAS B. BUTLER, as members of Chicago Railways First Mortgage Bondholders Protective Committee; WILLIAM McCORMICK BLAIR, JOHN W. ESMOND, STANLEY FIELD, WILLIAM C. FREEMAN and CHARLES H. THORNE, as members of Chicago City Railway Company and Calumet and South Chicago Railway Company First Mortgage Bondholders Protective Committees; JOHN E. BLUNT, WALTER S. BREWSTER, JOHN A. CHAPMAN and PERCY B. ECKHART, as members of Chicago Railways Company Consolidated Mortgage Series A Bondholders Protective Committee; CHARLES F. AXELSON, A. V. MORTON, and ORES E. BEHR, as members of Chicago Railways Company Purchase Money Mortgage Bondholders Protective Committee; and MARTIN LINDSAY, C. F. GLORE, W. FINDLEY DOWNS and A. R. BONE, as members of Chicago City and Connecting Railways Collateral Trust Bondholders Protective Committee,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved here is the validity of an order (R. 92) of the United States Circuit Court of Appeals for the Seventh Circuit dismissing appeals of the petitioners from orders (R. 50, 51, 53) of the United States District Court for the Northern District of Illinois, Eastern Division, entered September 12, 1947.

On September 29, 1947, petitioners filed in the District Court notices of appeal (R. 54) from the orders of September 12, 1947, their joint statement of points relied on for reversal and their joint designation of appeal record (R. 84). Thereafter, on the same day a designation of record (R. 58) was filed in the District Court by respondents, and at 3:15 p. m. petitioners were served with a copy of an unverified emergency motion to docket and dismiss the appeals (R. 65) and a copy of the designation so filed by respondents and were then notified to appear in the Circuit Court at 4:00 p. m. for a hearing of the motion (R. 83). At 4:00 p. m. counsel for the petitioners appeared in the Circuit Court and were then advised by the Clerk that the motion had been continued to 9:30 a. m.,

September 30, 1947 (R. 83). At that time counsel appeared in the Circuit Court and the emergency motion and short record called for by respondents designation and petitioners verified objections thereto were filed therein (R. 64, 81). In the objections the petitioners objected to a hearing of the motion under the circumstances and contested the grounds of the motion (R. 83-89). Thereupon counsel argued orally, and proceedings were had as shown by the record (R. 104-147). The appeals were dismissed from the bench at the conclusion of the arguments (R. 146, 147); and on the same day an order of dismissal was entered and mandates were issued to the District Court (R. 92). The record designated by respondents was on file when the motion came on for hearing; but at no time during the proceedings in the Circuit Court was the record designated by petitioners or their statements of points relied upon for reversal on file or otherwise before that Court (R. 84, 85).

The orders appealed from were entered in the District Court after a hearing of petitions filed by the petitioners on September 3, 1947 (R. 3). The cause in which the petitions were filed was a proceeding under Chapter X of the Bankruptcy Act to reorganize the Chicago Railways Company, an Illinois corporation, Debtor. The petitioners had been excluded from participation as creditors in the assets of the Debtor by orders approving and confirming a plan of reorganization which were affirmed by the Circuit Court, *In Re Chicago Rys. Co.* 160 Fed. (2) 59; and *certiorari* denied on April 14, 1947.

Briefly, the petitions filed in the District Court (R. 4) sought to relax and modify the injunction contained in an Order of Sale, in the Chapter X proceeding insofar as it enjoined petitioners from suing the City of Chicago and

the Chicago Transit Authority, neither one being the debtor in bankruptcy. The petitions alleged that rights against the City of Chicago and the Chicago Transit Authority had been conferred upon petitioners by a statute of the State of Illinois, an ordinance of the City of Chicago and a consolidated mortgage (R. 6). The petitions averred that the injunctive order prohibited petitioners from suing to enforce those rights (R. 14). In other words, all that the petitions sought was to relax and modify the injunctive order insofar as it precluded petitioners from prosecuting in an appropriate forum a plenary suit against persons other than the debtor. The nature of the asserted cause of action and the provisions of the injunctive order are more specifically set forth in the brief (*Infra*, p. 11 *et seq.*).

II.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., 347 (a)). The judgment of the Circuit Court of Appeals sought to be reviewed was entered September 30, 1947.

III.

THE QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals acquire jurisdiction to dismiss appeals within 24 hours after the timely filing of notices of appeal in the District Court, upon unverified "emergency" motions of respondents and short record designated by them, which did not show any failure by petitioners to comply with the legal requirements of an appeal, did not include petitioners' statement of points

relied upon for reversal and, with minor exceptions, contained none of the record called for by petitioners' designation of record, though petitioners' designation of record and statement of points relied on for reversal were on file in the District Court within the time provided by the Rules and at the time respondents filed their designation in the District Court?

2. By dismissing appeals within 24 hours after notices of appeal were filed in the District Court upon unverified "emergency" motion of respondents and short record designated by them which did not show any failure on the part of petitioners to comply with the legal requirements of an appeal, did not include petitioners' statement of points relied upon for reversal and, with minor exceptions, contained none of the record called for by petitioners' designation of record, though petitioners' designation of record and statement of points relied on for reversal were on file in the District Court within the time provided by the Rules and at the time respondents filed their designation in the District Court, did the Circuit Court of Appeals, in any one or more of those particulars, deny petitioners due process, contrary to the Fifth Amendment to the Constitution of the United States?

3. Did the District Court have jurisdiction to issue an injunctive order restraining the prosecution by petitioners of the suits contemplated by the petitions to relax and modify said injunctive order?

4. Was the substantive question raised by the petitions previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the Plan and, if so decided, being a question of jurisdiction of the subject matter, may it not be reconsidered on this appeal?

5. Were the orders from which the appeals were taken appealable orders?

6. Do petitioners have an appealable interest in the subject matter of these appeals?

7. Did the question presented by the petitions, namely, whether petitioners had the right to prosecute the causes of action asserted, present questions of the constitutionality and construction of state laws, which should be left to appropriate decision in proceedings in the state courts?

8. Is the effect of the decision of the Circuit Court of Appeals to ignore state decisions upon local or state matters binding on the Federal courts?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. (See Questions Presented 1 and 2).

2. The Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be settled by this court, namely, the question of the jurisdiction of a Circuit Court of Appeals to dismiss an appeal. (See questions Presented 1).

3. In dismissing the appeals notwithstanding petitioners' invocation of the due process clause of the Fifth Amendment, The Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this court, namely, whether that court denied petitioners an opportunity to be heard. (See Questions Presented 2).

4. Petitioners have never had a review of the constitutional question whether the Circuit Court of Appeals denied them due process of law, arising as it did for the first time in that court. Nor did petitioners have an initial hearing of that question in that court by reason of the very circumstances out of which the question arose. (See Questions Presented 2).

5. The decision of the Circuit Court of Appeals, in dismissing these appeals, and thereby precluding petitioners under penalty of contempt from prosecuting their claimed causes of action against the city of Chicago and the Chicago Transit Authority, is in conflict with their prior decision *in re Diversey Bldg., Corporation*, 86 F (2d) 456 and the decision of the Second Circuit *in Re Nine North Church Street, Inc.*, 82 F. (2d) 186, both holding that a court in bankruptcy has no jurisdiction to extinguish liabilities of persons other than the debtor and no jurisdiction to enjoin the prosecution of suits to enforce such liabilities. (See Questions Presented 3, 4, 6).

6. The decision of the Circuit of Appeals, in dismissing these appeals, and thereby precluding petitioners under penalty of criminal contempt from prosecuting their claimed causes of action against the City of Chicago and the Chicago Transit Authority in effect determines that under the Ordinance of 1907, passed pursuant to the Mueller Act of the State of Illinois, petitioners have no cause of action as aforesaid. Whether they have or not is a question of the construction and constitutionality of the Act and the ordinance, a matter to be determined solely by the state court. The decision is therefore contrary to *American Federation of Labor* v. *Watson*, 327 U. S. 582, 599, and related cases, holding that the Federal Courts will not pass upon the constitutionality and construction of state statutes and ordinances in the absence of an authori-

tative state court decision. There was none here for the obvious reason that no question of liability such as is urged here could conceivably arise until the City had designated a licensee to acquire the property or granted a franchise to another company (See Sec. 23 of Ordinance; R. 6), which didn't occur until Apr. 23, 1945 (R. 8, 9).

7. The decision of the Circuit Court of Appeals, in dismissing these appeals, and thereby precluding petitioners under penalty of criminal contempt from prosecuting their asserted causes of action in effect determines that under the Ordinance of 1907, passed pursuant to the Mueller Act of Illinois, petitioners have no cause of action as aforesaid. This is directly contrary to *Chgo. City Ry. Co.* v. *Chgo.*, 323 Ill. 245, 252, squarely holding that the ordinance was a contract between the City and the Chicago City Ry. Co., the decision of Judge Wilkerson in *Harris Trust and Savings Bk.* v. *Chgo, Rys. Co.*, 39 F. (2d) 958,960, that the statute and ordinance manifested a "clear intention . . . to provide assurance, legally obligatory upon the city for the protection of the investment" and the decision in *Carson Pirie Scott & Co.* v. *Parrett*, 346 Ill. 252, 257, permitting a third party to sue directly on a contract entered into for his benefit. The decision is therefore contrary to *Erie Railroad Co.* v. *Tompkins*, 309 U. S. 64, and related cases, holding that in matters of state law, the Federal Courts are bound by state decisions.

8. The decision of the Circuit Court of Appeals is in conflict with *Lynch* v. *Durfey*, 180 Fed. 2d 181 (9th Circuit), holding that it was improper to dismiss appeals on an inadequate record. (See Questions Presented 1).

V.

PRAYER.

Wherefore, your petitioners pray that a writ of *certiorari* issue under the seal of this court, directed to the Circuit Court of Appeals for the 7th Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the cases numbered and entitled on its docket, No. 9471, Appeal of Central Hanover Bank and Trust Company, as trustee, etc.; No. 9472, Appeal of Nahum Birnbaum, et al. and No. 9473, Appeal of James A. Cole; to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this court may seem proper.

Respectfully submitted,

BARNABAS F. SEARS,
WILLIAM RUFUS MORGAN,
Counsel for Petitioners.

December, 1947.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

No written opinion was delivered. The appeals were dismissed upon respondents' emergency motion to docket and dismiss same. The court heard oral arguments, at the conclusion of which it orally pronounced its judgment from the bench. (R. 146,147).

II.

STATEMENT OF THE CASE.

The Order of Sale entered in the reorganization of the debtor, Chicago Railways Company, enjoined all proceedings of any nature by any person participating in the reorganization proceeding against any person participating therein. This includes the petitioners, the City of Chicago and the Chicago Transit Authority, the purchaser of the properties of the debtor. Specifically, that injunctional order is as follows (R. 14):

"Injunction to Protect Purchaser

"The creditors and stockholders of and participating certificate holders and claimants against any of the companies or the Chicago City and Connecting Railways Collateral Trust or their trustees or receivers, including, but without limiting the generality of the foregoing, all holders of bonds and coupons issued under any mortgage or trust indenture executed by any of the companies or said Trust and all persons claiming by, through or under the companies or said

Trust or their Trustees or Receivers either as or under its creditors or stockholders or the holders of its participating certificates (except the holders of those claims or obligations or liabilities to be assumed by the purchaser pursuant to the provisions of Article IV of this order) are hereby, severally and respectively, perpetually enjoined from prosecuting against the purchaser, or any nominee or assignee or grantee of the purchaser, or against any party to these proceedings, or person required to do anything under this order, or against any person or corporation claiming by, through or under them or any of them, or against any of the property sold pursuant to this order, any suit or proceeding arising out of or based upon any obligation or liability of any of the companies or said Trust or their Trustees or Receivers, or otherwise, to impose liability upon the purchaser or upon any nominee or assignee or grantee of the purchaser, or upon any party to these proceedings, or person required to do anything under this order, or upon any person or corporation claiming by, through or under them or any of them, or upon any property sold pursuant to this order, in respect of any claim against any of the companies or said Trust or any of their Trustees or Receivers, or any trustee under any mortgage or trust indenture, or any claim under or in respect of any bond or coupon issued under any mortgage or trust indenture of any of the companies or said Trust, or in respect of the indebtedness represented thereby, or to charge the purchaser or any nominee or assignee or grantee of the purchaser, or any party to these proceedings, or person required to do anything under this order, or any person or corporation claiming by, through or under them or any of them, or any property sold pursuant to this order, with any liability on or in respect of any matter or thing adjudicated by or done or omitted to be done in pursuance of this order except pursuant to the provisions of and in subordination to this order.

"Without limiting the generality of the foregoing, the persons enjoined pursuant to this order include all holders of bonds issued under and secured by any mortgage, trust deed or other instrument executed by any of the companies, or the Chicago City and Connecting Railways Collateral Trust; and also all creditors, stockholders and security holders of each and every class of any of the companies or said Trust, including any class of Participating certificate holders and the trustees for any class of participating certificate holders, whether or not any such creditor, stockholder or security holder shall have filed proof or notice of a claim or interest pursuant to the orders of this Court heretofore made and entered; all intervenors herein; all mortgage or indenture trustees or trustees for any class of Participating certificate holders; and all such parties or persons in interest who were or had the right to be heard in the above entitled causes with respect to the Plan or any other matter before the Court in said causes.

"Whenever used in this order, the word 'person' shall be deemed to include the plural as well as the singular and shall be deemed to include firms, associations and corporations as well as individuals."

Petitioners, who are Series B bondholders of the Chicago Railway Company, (Petitioner Cole in addition owns Participating Certificates for the stock of that company) were denied participation under the Plan of Reorganization of said debtor. (160 F (2) 59.) In addition to and independently of their rights against the debtor, petitioners also claim rights "arising out of or based upon" the "obligation or liability" of the City of Chicago or the Chicago Transit Authority, the purchaser of the properties in question, or both, under an ordinance of the City of Chicago passed in 1907 pursuant to statutory authority.

The broad sweeping injunctional order, preventing peti-

tioners from asserting these rights (Rec. 14) under penalty of contempt, required petitioners to file the instant petitions. These petitions sought merely to relax and modify the provisions of the injunctional order so that petitioners might file appropriate proceedings in the state courts for the enforcement of these claimed independent rights (Rec. 17). That is the sole and only substantive issue at bar.

Nature of Cause of Action Asserted.

We now set forth briefly the nature of this independent cause of action solely for the purpose of indicating to the Court that it is not of a frivolous nature; for obviously the question of whether or not we have a valid cause of action is for the state court to determine inasmuch as it involves purely local law.

In 1907, the City of Chicago also had a traction problem. To solve that problem, the Mueller Act was passed by the General Assembly of Illinois (Laws of 1903, page 285; Jones and Addington Illinois Statutes Annotated, Chapter 131 (a), Section 11121). Its title was "To Authorize Cities to Acquire, Construct, Own, Operate and Lease Street Railways and to Provide the Means Therefor." The Act authorized cities to "own, construct, acquire, purchase, maintain and operate street railways within its corporate limits and to lease the same * * * to any company * * * for the purpose of operating street railways for any period not longer than 20 years on such terms and conditions as the City Council shall deem for the best interest of the public." It also provided that any city could "incorporate in any grant of the right to operate street railways and grant of the right to operate street railways, a reservation on the part of such city to take over all or part of such street railways at or before the expiration of such grant upon

such terms and conditions as may be provided in the grant" and in case such reserved right be not exercised by the city and it shall grant a right to another company, to operate a street railway in the streets and parts of streets occupied by its grantee under the former grant, the new grantee shall purchase and take over the street railway of the former grantee upon the terms that the City might have taken it over (Appendix I, *infra*, p. 56).

At this time, there were several street railways operating under the name of Union Traction System and were in receivership in the United States District Court (*Chicago* v. *Harris Trust & Savings Bank*, 40 Fed. (2d) 612.) Petitioner Cole and his family were the holders of the securities of one or more of them. (R. 5, 6) Armed with the legislative grant, the City participated in the reorganization and the Chicago Railways Company was incorporated to take over the properties. To induce the security holders of Union Traction and its affiliated companies to participate in the plan, the City of Chicago passed the Traction Ordinance of 1907. The ordinance embodied covenants whereby the City of Chicago reserved the right to purchase the properties for a base price fixed in the ordinance plus additions and extensions at a figure to be approved by the Board of Supervising Engineers created under the ordinance. The ordinance further provided that if the City of Chicago or its licensee should not purchase the properties on or before February 1, 1927, and if the City should thereafter purchase or designate a licensee to purchase said properties, or if the City should grant a right to another company to operate a street railway, then the City or such licensee or new company should be obligated to pay the ordinance price for the properties (see Sec. 23 thereof; R. 6).

As of January 31, 1947, the ordinance purchase price for Chicago Railways was $101,648,771.55 (R. 9). The City of Chicago granted a franchise to Chicago Transit Authority on April 23, 1945, and the latter purchased the Railways' property at the sale under the Plan for $44,475,000.00.

While the following might be more properly presented in the argument, we deem it not amiss to here state that in *Harris Trust and Savings Bank* v. *Chicago Railways Co.*, 39 Fed. (2) 958, (the City of Chicago was a party), Judge Wilkerson stated with respect to the ordinance and statute in question (960):

> "With this contention, the Court does not agree, for the reason that the City Ordinances above referred to and the Act of the Illinois Legislature on May 18, 1903 (commonly known as the Mueller Law, Illinois Statutes, (Cahill's Rev. St. 1927), c. 131a, pars. 8-13), in pursuance of which these ordinances were adopted, seem to the court to manifest a clear intention not only to provide terms and conditions covering the city's consent to the use of city street during the grant, *but also to provide assurance, legally obligatory on the city, for the protection of the investment 'at and after' as well as 'during' the term expiring February 1, 1927*". (Italics ours)

This is borne out by the fact that one of the special conditions of the Ordinance (special conditions, Sec. 1 (a) (e),) was the exchange of securities of predecessor companies to the Chicago Railways and the acceptance by those security holders of Series B bonds and participating certificates of said Chicago Railways here involved. (This ordinance is not in the present record for the reason that, although attached to the original petitions as Exhibit A (R. 6), respondents failed to incorporate it in the record on appeal. It was called for by our designation). So that

actually these prior security holders gave up their securities and accepted securities of the Chicago Railways upon the faith of said ordinance.

Petitioners further claim that this ordinance was a contract between the City and the Railways (*Chgo. City Ry. Co.* v. *Chgo.*, 323 Ill. 245, 252) and persons who gave up their security and took B bonds in the Railways upon the faith of said ordinance, or, if only a contract between the City and the Railways, that it was entered into for the direct benefit of such persons who so took B bonds entitling such persons to directly sue thereon for breach thereof (*Carson Pirie Scott & Co.* v. *Parrett*, 346 Ill. 252, 257); that the City of Chicago was in effect a guarantor to them that the provisions of the ordinance would be abided; that the purchaser, Chicago Transit Authority, acquired the franchise and purchased the properties with knowledge of and subject to the provisions of said ordinance and thereby became liable thereunder; that these *rights* which inure directly to them under the ordinance were neither assets nor liabilities of the debtor, Chicago Railways Company; and that the District Court could not jurisdictionally enjoin petitioners from prosecuting a plenary action in the State Court for the enforcement of those rights against the City of Chicago and the Chicago Transit Authority, they not being debtors in said proceeding, and their liabilities and obligations therefore not being the subject matter of composition limitation, modification or extinguishment.

Proceedings in Circuit Court of Appeals.

We have heretofore in the summary statement set forth the disposition of the petitions to relax and modify the injunctive order by the District Court and the disposition of the appeals from the orders denying same. The

"emergency" motion to dismiss the appeals was unverified and was supported only by the short record filed by respondents which, as we have pointed out, did not contain petitioners statement of points relied on for reversal and, with minor exceptions the record matters called for by petitioners' designation of record. Both petitioners' designation of record and statement of points relied upon for reversal were on file in the District Court at the time respondents designation of record was filed therein (R. 84, 85).

The emergency motion to docket and dismiss the appeals assigned three grounds therefor (R. 69):

1. The order from which these appeals are taken is not an appealable order: The order denies and dismisses petitions which seek rehearing or modification of prior orders and attempts to relitigate questions admittedly settled by the Plan and adjudicated by the orders of approval and confirmation. Two of said petitions seek specifically to amend the order of sale entered March 7, 1947 (from which order three appeals were taken and dismissed by this Court on April 21, 1947. Nos. 9353, 9354, 9355).

2. All substantive questions raised by the petitions filed in the court below were decided by this court in its decision affirming the District Court's approval and confirmation of the Plan. The petition to amend or alter the order of sale is based on precisely the same grounds which were urged in this Court against the motion to dismiss the appeal from that order.

3. The appellants have no appealable interest in the subject matter of this appeal. Under the opinion and judgment of this Court entered January 4, 1947, appellants "have no equity". (Petition for certiorari to review that judgment was filed April 3, 1947; motion to advance disposition thereof was filed April 11; certiorari was denied April 14, 1947.)

The emergency character of the motion was stated therein to be as follows (R. 66):

> The existence of these appeals creates a critical condition. The Authority is now prepared to pay the purchase price and accept delivery of the property on September 30, 1947; thus, ending over twenty years of litigation.
>
> When the money is obtained from the purchasers of the bonds, counsel for the underwriting syndicate must certify to good title in the Authority. The bonds were sold to the public subject to such opinion of counsel. If an undisposed appeal appears on the opinion of title, it could disrupt the entire transaction because bond buyers, being laymen, would have no judgment as to whether or not the appeal possesses substance. This may well place the entire sale of the bonds in jeopardy. Over two and one-half years of incessant labor have gone into bringing this plan as close to realization as it is today. The money has been subscribed—the documents of transfer are ready for delivery. The public interest in the consummation of this sale is paramount. Frivolous and unfounded appeals such as these should never be permitted to frustrate and defeat that interest. These appeals have no substance or merit. They are being interposed at the last moment for the sole purpose of thwarting the consummation of this Plan.

As indicated, this motion was unverified.

To this emergency motion petitioners filed verified objections (R. 83) as follows:

> 1. This court has no jurisdiction to entertain and dismiss this appeal as there was not transmitted to this court, nor is there on file herein, a sufficient appeal record in conformity with the rules in such cases made and provided.
>
> 2. These appellants object to a hearing of this

motion at 9:30 a. m. on September 30, 1947, for the reason that they were not served with notice of this motion until 3:15 p. m. on September 29, 1947, and were then noticed to appear at 4:00 p. m. on said date for a hearing on said motion before this court, which as a matter of courtesy to this court, they then and there did, at about which time they were advised by the Clerk of this court that the motion had been continued to 9:30 a. m. on September 30. It seems rather obvious that due process requires a reasonable notice and opportunity to be heard and that a hearing of this motion at 9:30 a. m. on September 30, 1947 would deny unto these appellants due process of law in contravention of the mandate of the Fifth Amendment to the Constitution of the United States, the benefit and protection of which these appellants are entitled in law and now claim and urge.

3. The motion and statements made therein with respect to its emergency character are unverified. Furthermore, the motion presents matters completely extraneous to this proceeding and contains intemperate and unfounded remarks, unsupported by the record, calculated to prejudice this court against appellants and their counsel. Counsel for the appellants desire to assure this court that these appeals are being taken in good faith and in the interests of their clients and for the protection of their rights.

4. The orders appealed from are clearly appealable orders, and even if there were some question with respect to whether they are appealable (which we do not concede to exist), appellants are entitled to a hearing on the substantial merits of their appealability under well-settled principles of appellate procedure rather than have the appeals summarily disposed of on a motion to dismiss prior to certification to this court of appellants' record on appeal heretofore designated and now on file in the office of the Clerk of the District Court.

5. Appellants have taken all necessary steps required by the rules for the perfection of an appeal expeditiously and earlier than the time required by said rules; they filed with the Clerk of the District Court on September 29, 1947, their several notices of appeal, their joint statement of points relied on for reversal, and their joint designation of contents of appeal record, and on said date mailed to all counsel of record copies of a notice in due form, together with copies of said statement of points and designation of contents of appeal record. Counsel for appellants will shortly be prepared to file with the Clerk of the District Court the items designated in the appeal record.

6. This court is without jurisdiction to entertain and act upon the motion to dismiss the appeals for the reason that appellants' designation of points and said appeal record to be relied on for reversal are not before this court and this court is, therefore, powerless to know the nature and purpose of these appeals until such record is before it. Furthermore, appellants are entitled to have such record is before it. Furthermore, appellants are entitled to have that part of the record designated by them before this court because this court cannot determine the nature and purpose of the appeals until such record is before it. The questions raised by these appeals have never been decided, as appears from the appellants' designated record. As a matter of fact, prior to entry on September 12, 1947, of the orders from which these appeals have been taken, these same counsel for appellees presented to the District Court a draft order wherein they requested the District Court to find the following:

> "Finds that said petition is a petition for rehearing of objections which the petitioners heretofore have made to the plan of reorganization heretofore approved and confirmed, and to the

order of sale heretofore entered herein, and presents matters heretofore heard and adjudicated by this Court and by the Courts of appellate jurisdiction, and that the same should be denied."

But the District Court refused to so find and instead, in ink, crossed out such proposed finding from the form of order as entered, as will more fully appear from the appellants' record when appropriate copies of said order are filed herein, appellants being advised on information and belief that the orders designated in appellees' so-called short record do not disclose these facts. The transcript of the hearings before the District Court on September 12, 1947 will disclose the statement of the Court to the effect that he did not intend to make such findings consistent with those suggested by counsel for appellees, as above set forth. The transcript of the proceedings of September 12, 1947 is a part of the appeal record designated by the appellants. When these facts, in addition to appellants' statement of points relied on for reversal, are before this court, it will become clearly evident that the questions which appellants are trying to have heard by this appeal have never been previously determined.

7. Appellants clearly have an appealable interest from final or temporary orders which denied and dismissed their petitions seeking to clarify, modify or relax an injunctional prohibition against the prosecution of the cause or causes of action in said petitions more fully described, particularly where the court in the first instance was without jurisdiction to issue such a broad, sweeping injunctional order prohibiting or purportedly prohibiting the institution and prosecution of the cause or causes of action contemplated by the appellants.

8. Claimed or pretended emergencies do not create rights. Neither should they be permitted to abrogate existing rights. This is particularly true in

this case where rights have been in existence long prior to the claimed or pretended emergency. The inpact of this principle is all the more emphasized where, as here, the claimed or pretended emergency upon which this court is asked to act judicially is premised upon unverified general statements of interested counsel, and is nowhere cited to any portion of the record for its support. The buyers of Chicago Transit Authority bonds and counsel for alleged underwriting syndicates are not parties to this appeal and nowhere does their interest in the subject matter of appellants' appeals appear in the record; further, such interest, if any, is junior and subordinate to appellants' rights and causes of action inherent in appellants' appeals. It is not the duty of this court to protect the buyers of Chicago Transit Authority bonds and alleged underwriters; rather, it is the duty of this court to adjudge the rights of litigants properly before it within the limits of its jurisdiction.

9. In urging that appellants have no equity in the debtor and therefore no appealable interest, being Point III of appellees' motion, appellees have entirely misconceived the nature of appellants' causes of action as set forth in the petitions. This would more fully appear if appellants' statement of points relied on for reversal were in the record presently before the court. The appellants do not seek to prosecute any action against the debtor, nor have the appellants placed the plan of reorganization in issue by their appeals. Appellants seek to prosecute actions against the City of Chicago and the Chicago Transit Authority arising out of (a) contractual liabilities created by an ordinance passed by the City Council of Chicago in 1907 pursuant to authority previously granted said City by the legislature of Illinois by an act more commonly known as the "Mueller Act" and other documents including the Consolidated Mortgage; and (b) the granting of and the provisions of the ordi-

nance passed by the City Council of the City of Chicago on April 23, 1945 to the Chicago Transit Authority, which ordinance was accepted by the Chicago Transit Authority, all as set forth in the petitions. Appellants' asserted causes of action do not in any way interfere with the District Court's jurisdition of the debtor or its estate or its lawful reorganization. Appellants do not by their appeals seek to retry issues heretofore adjudicated. Appellants by their appeals merely seek to obtain clarification, amendment and relaxation of injunctional orders heretofore entered by the District Court, which on their face prohibit or purport to prohibit appellants from prosecuting causes of action against persons other than the debtor, and concerning whose liabilities the District Court was without jurisdiction to extinguish, modify or adjudicate.

10. The above and foregoing are not intended to be all inclusive of appellants' objections to the motion to dismiss the appeal or the principles in support thereof. But appellants reserve the right to argue these and others orally, and resectfully request that this court, in view of all attendant circumstances, grant additional time to appellants for the filing of written briefs.

In point of information, this was dictated at 10:45 p. m. on September 29, 1947, when one of appellants' counsel had yet a journey of some forty miles to his place of abode. Thereafter, the transcription, editing and typing of these objections was completed at about 2:30 a. m. on September 30, 1947.

11. Appellants do not here cite authority to support these objections because of lack of time in preparation, but request leave to argue the motion orally and to cite authorities upon said oral argument, and leave to submit written briefs as above requested, all without prejudice to their rights to have these appeals proceed in an ordinary and customary man-

ner and without prejudice to the rights of appellants to bring before this court their own record and brief and argument and to have oral argument thereon in a hearing upon the merits of these appeals.

The emergency motion and the objections were ordered filed by the Court upon its convening on September 30, 1947, and thereupon the court heard oral arguments. At the conclusion of the arguments, the court, from the bench, orally dismissed the appeals (R. 146, 147). The arguments of counsel, the comments of the court during the course of the argument and its oral pronouncement were made a part of the record upon petitioners' motion (R. 102). These proceedings begin at page 104 of the record. They clearly indicate the grounds upon which the Circuit Court dismissed the appeals. Particularly we desire to point out the comments of Judge Evans with respect to the effect of the injunctional order beginning on page 132 of the record and again on page 133 and 134 of the record; and to His Honor's comments beginning on page 137; and the proceedings thereafter to the end of the hearing, with particular reference to His Honor's following observation (R. 144, 145):

> "If your appeal is not frivolous you have a right to be heard. We are considering your appeal, and the statute gives you a right to appeal, and we are considering the grounds for dismissal on the grounds that it is frivolous and without merit, and these facts about this emergency matter."

As indicated, the facts about the emergency matter were unverified and were not and could not be record matters in this appeal.

III.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in dismissing the appeal for the reason that it had not acquired jurisdiction so to do.

2. The judgment of the Circuit Court of Appeals dismissing the appeal denied petitioners due process of law contrary to the Fifth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals erred in not holding that the District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

4. The Circuit Court of Appeals erred in not holding that the substantive questions raised by the petitions had not been previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the Plan.

5. The Circuit Court of Appeals erred in not holding that the orders from which the appeals were taken were appealable orders.

6. The Circuit Court of Appeals erred in not holding that petitioners have an appealable interest in the subject matter of these appeals.

7. The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionality and construction of those state laws which, in the absence of authoritative state deci-

sion, should be left for decision in appropriate proceedings in the state courts.

8. The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the Federal Courts.

9. The Circuit Court of Appeals erred in sustaining the motion to dismiss the appeals.

SUMMARY OF ARGUMENT.

1.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that it had not acquired jurisdiction so to do.

An appellate court does not acquire jurisdiction to dispose of an appeal until there has been observed the necessary steps upon which its appellate jurisdiction is premised, or there has been a failure to observe same.

2.

In dismissing the appeals, the Circuit Court of Appeals denied petitioners due process of law contrary to the fifth amendment to the constitution of the United States.

3.

The Circuit Court of Appeals erred in sustaining the emergency motion to dismiss the appeals.

(a) The District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

(b) The question of whether petitioners could prosecute a suit against the City of Chicago and Chicago Transit Authority of the character contemplated by the petitions to relax and modify had not been previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the Plan; and even if it was decided, being a question of jurisdiction of the subject matter, it could be reconsidered on a subsequent appeal.

(c) The orders appealed from were appealable orders.

(d) Petitioners have an interest in the subject matter of their appeals.

4.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionality and construction of those state laws which, in the absence of authoritative state decision, should be left for decision in appropriate proceedings in the state courts.

5.

The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the federal courts.

IV.

ARGUMENT.

1.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that it had not acquired jurisdiction so to do.

An Appellate Court does not acquire jurisdiction to dispose of an appeal until there has been observed the necessary steps upon which the appellate jurisdiction is premised or there has been a failure to observe same.

Petitioners filed notices of appeal in the District Court and at the same time filed their designation of record, and inasmuch as the entire record wasn't designated, their statement of points relied upon. That day they sent notice of such filing to opposing counsel. All of this was done conformably to Rules 73 and 75 of the Rules of Civil Procedure. Within a matter of minutes after such filing, respondents filed a designation of record in the District Court and within an hour thereafter served petitioners with a copy of their designation and an unverified emergency motion to docket and dismiss the appeals so taken and a notice that within an hour they would appear in the Circuit Court of Appeals for a hearing on the motion. All counsel appeared and the matter was continued until the convening of the Court the next morning.

That morning respondents filed a short record and a motion to dismiss, the petitioners filed written verified objections, the Court heard oral arguments and the appeals were dismissed. The only record matters in the short record were those called for by respondents designation,

which, except for the original petitions, the orders denying same and the notices of appeal, contained none of the record called for by petitioners' designation. Petitioners' designation and statement of points were on file in the District Court at the time respondents' designation was filed there.

Under Rule 73 there were yet 39 days remaining within which the record on appeal could be filed and docketed. Ignored was Rule 75(g) which provides that the "clerk of the District Court . . . . shall transmit to the Appellate Court a true copy of the matter designated by the parties but shall always include, whether or not designated, copies of the following: . . . . *the designation or stipulations of the parties as to the matter to be included in the record; and any statement by the appellant of the points on which he intends to rely*". Rule 75(g) further provides that "The matter so certified and transmitted constitutes the record on appeal".

Rule 10(1) of the Seventh Circuit provides that "The record on appeal shall be prepared and the transcript thereof filed in this Court, as provided in Rule 75 and 76 of the said rules of Civil Procedure". Rule 9(1) of that Court also provides that in all appeals "the appellant shall file with the clerk of the district Court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged". It also provides that "*No appeal shall be considered, unless such a statement of points shall have been so filed*".

Rule 75(j) of the Rules of Civil Procedure provides that "If, prior to the time the complete record on appeal is settled and certified as here provided, a party desires to docket the appeal in order to make in the Appellate Court

a motion for dismissal, ... the Clerk of the District Court at his request shall certify and transmit to the Appellate Court *"a copy of such portion of the record or proceedings below as is needed for that purpose."*

The only provision for an emergency motion is found in Rule 19(4) of the Seventh Circuit which states that such a motion "with proof of service of same shall be filed and at once tendered to the Court by the Clerk for instructions as to the manner of submission and date of same."

Obviously this rule could not contravene the rules of Civil Procedure and it should not be construed so as to contravene rules 9(1) and 10(1) of the same Court. In dismissing this appeal, the Court ignored its own Rule 9(1) and it ignored Rule 10(1) unless it can be said that it acquired jurisdiction pursuant to the provisions of Rule 75(j). Whether it would or not depends upon the question of whether there was transmitted to it by the Clerk "a copy of such portion of the record or proceedings below" as was necessary for the purpose of dismissal.

We could cite many cases to the effect that before a court acquires a jurisdiction it must proceed according to the established modes governing the class to which the case belongs. This is an appeal and it would seem elemental that the court, to acquire jurisdicton, should proceed according to the necessary rules upon which its jurisdiction is premised. As was stated in 10 Cyc. of Federal Procedure (2d Ed.), Section 4718, p. 87:

> "There is, of course, an obvious distinction between the abstract 'jurisdiction' which a reviewing court is accorded by statute and the jurisdiction which it exercises in a concrete case. It is presupposed that in a given case the necessary routine, upon the carrying out of which the taking of appellate jurisdiction is premised, will be observed. If it is not, jurisdiction is not acquired."

It is submitted that in the first place Rule 75(j) was not intended to apply to a situation comparable to the one at bar, but was only intended to apply to situations where there had been a failure to comply with the procedural requirements of an appeal (*Lynch* v. *Durfey*, 108 F. (2d) 181; *Halfpenny* v. *Miller*, 232 U. S. 113, 115; *Bennell Realty Co.*, v. *E. G. Shinner & Co.*, 87 F. (2d) 824, 826; *Davis* v. *F. W. Woolworth Co.*, 54 F. (2d) 366).

Further, if it does apply there was not transmitted to the Court, "a copy of such portion of the record of proceedings below as is needed" for the purpose of dismissal. How could the Court judicially know what the appeal was about without the statement of points relied on for reversal? How could it judicially know the record facts supporting those points without it having that part of the record called for by petitioners' designation? Would it acquire jurisdiction to act upon a record which did not contain those matters? Can it judicially act upon a record selected solely by an appellee and accompanied by an unverified "emergency" motion containing collateral matters involving the interests of persons, not parties to the proceeding?

Rule 75(j) must be read with Rule 75(g) so that where there is on file in the District Court an appellant's designation of record and statement of points at the time an appellee files its designation and thereafter moves for a dismissal, the record to be filed in support of such motion to docket and dismiss must contain, as Rule 75(g) provides before it can constitute "the record on appeal", a copy of "the designations or stipulations of the parties as to the matter to be included in the record and any statement by the appellant of the points on which he intends to rely". Only in that way will the necessary procedural steps inci-

dent to the acquisition of jurisdiction on the part of the Circuit Court of Appeals be observed and only thereby will that Court acquire jurisdiction. Compare *Lynch* v. *Durfey*, 108 F. (2d) 181; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290.

2.

In dismissing the appeals, the Circuit Court of Appeals denied petitioners due process of law contrary to the fifth amendment to the Constitution of the United States.

The motion in the Circuit Court presented the question whether the appeals should be dismissed. That depended, of course, not only upon the law, but also upon the facts with respect to the appeals. An opportunity to present facts upon the question was just as important to petitioners as an opportunity to argue the law. It is self-evident that both the facts and the law are essential to a consideration of any legal question and that due process requires an opportunity to be heard upon the facts, as well as the law. Such was the view of this court in *Saunders* v. *Shaw*, 37 S. Ct. 638; 244 U. S. 317, 319; 61 L. Ed. 1163, 1165, where no opportunity to present facts by the introduction of evidence was held to violate the due process clause.

The petition at bar shows that the Circuit Court denied petitioners an opportunity to be heard, in that they had no opportunity to present facts to the Circuit Court with respect to their appeals. On the very day when petitioners filed in the District Court their notices of appeal, joint designation of record and joint statement of points relied on for reversal, they were served, at 3:15 p.m., with notice of the motion to docket and dismiss their appeals, supporting suggestions and appellees' designation of rec-

ord. The motion was set and came on for hearing at 9:30 a.m. the following day, when petitioners, with leave of court filed written objections to the motion, reciting the foregoing facts, suggesting that the record designated by petitioners was not before the court and specifically raising the question of due process. Notwithstanding, the court proceeded to consider the motion and dismissed the appeals. At no time was the record designated by petitioners on file or otherwise before the Circuit Court.

By the timely filing of their notices of appeal designaion of record and appeal bonds, petitioners set in motion the machinery which would transmit their record from the District Court to the Circuit Court. Having done that, they had done all they could do. That was their only opportunity to present facts to the Circuit Court, that court being of course, confined to the record in considering the facts of the appeals. That court denied petitioners their only opportunity by proceeding without their record. Appellees' record did not supply the omission. With minor exceptions, that record contained none of the record designated by petitioners. Certainly, petitioners were not limited by appellees' record. Petitioners took the appeals; and they had a right, by their own designation of record, to support their appeals factually as they saw fit.

This is not a question of the adequacy of an opportunity to be heard, which varies according to the nature of the proceeding. This is a case where there was no opportunity at all with respect to an essential element of due process, namely, the right of a litigant to present to the court the facts of his case.

The merits of the motion have no bearing upon the present contention of petitioners. Whether they would,

with due process, have prevailed against the motion, has nothing to do with due process. Right or wrong, they were entitled to an opportunity to be heard, *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424; 35 S. Ct. 625; 59 L. Ed. 1027, 1032. However, as petitioners argue hereafter, they should have prevailed against the motion. The motion being without foundation, the merits of the appeal should have been considered, and by denying petitioners the opportunity to file their record, the Circuit Court of Appeals denied them due process both as to the motion and as to the merits of the appeals themselves. While an appeal is not necessary to due process, if the statute gives an appeal, it becomes a part of the proceeding and subject to the requirements of the due process clause. *Frank* v. *Mangum,* 237 U. S. 309 , 327, 59 L. Ed. 969, 980, 35 S. Ct. 582; *Boykin* v. *Huff,* 121 Fed. (2d) 865, 872.

Petitioners, it is true, received the formalities of a hearing. But due process of law is not concerned with the mere form of procedure. *Palko* v. *Connecticut,* 302 U. S. 319, 327, 82 L. Ed. 288, 293, 58 S. Ct. 149; *U. S. National Bank* v. *Pamp,* 83 Fed. (2d) 493, 503. Here the substance of a hearing was lacking. Not only were petitioners deprived of the right to present their facts to the Court, but consider the notice. Must an appellant be ready under penalty of dismissal to fully and thoroughly argue his appeal within twenty-four hours from the time his notice of appeal is filed insofar as due process is concerned? If he must then the Rules of Civil Procedure are illusory.

In this case, petitioners never saw the emergency motion to dismiss until 3:15 in the afternoon. It and the suggestions accompanying it cover thirteen pages in the record (Rec. 66-78). It cited eleven cases. The notice accompanying it advised that it was to be presented for a hearing

at 4:00 o'clock that afternoon. We arrived at the Circuit Court of Appeals at the appointed hour and about 4:45 were advised by the Clerk that the matter had been continued until 9:30 A.M. the next morning. Thereupon we returned to our offices where, until 2:30 A.M. on the morning of the hearing, we were involved in the preparation of our suggestions in opposition to the motion to dismiss (Rec. 82-89). And this in a case which involves probably the most important public utility matter in the experience of Chicago. And all of this because of unsupported, unverified allegations in the motion (Rec. 66, 67) with respect to the probable activities of persons not parties to the record!

Furthermore, the effect of the dismissal is to preclude petitioners, under penalty of criminal contempt, from prosecuting a cause of action. For practical purposes, this is tantamount to a denial of the right to sue on such cause of action. An existing right to sue is property and a denial of that right is a denial of due process (*Angle* v. *C. M. & St. P. R. Co.*, 151 U. S. 1, 14 S. Ct. 240, 247); *Martinez* v. *Fox Valley Bus Lines*, 17 F. Supp. 566, 577; 12 Am. Jur. p. 348, sec. 661).

3.

The Circuit Court of Appeals erred in sustaining the emergency motion to dismiss the appeals.

If it be assumed that the Circuit Court of Appeals had jurisdiction to dismiss the appeals and did not deny petitioners due process in the dismissal thereof, still on the merits of the emergency motion, the appeals should not have been dismissed for the reasons following:

(a) The District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

The question here is not whether the substantive cause of action asserted against the City of Chicago and the Chicago Transit Authority under the 1907 ordinance as set forth beginning on page 14 of this brief is well founded for the obvious reason that that question depends upon the construction and constitutionality of a state statute and a city ordinance not heretofore construed as to this point and is a question of purely local state law, to be determined by the State courts (*American Federation of Labor* v. *Watson,* 327 U. S. 582, 599). The question here is whether or not the District Court could jurisdictionally enjoin the prosecution of a suit of this character.

The effect of the dismissal of the appeal is to preclude petitioners under penalty of criminal contempt, from prosecuting such a suit in any court, irrespective of the District Court's jurisdiction to enter the injunctive order (*U. S.* v. *United Mine Workers,* 91 L. Ed. (Adv. Op.) 595, 614). The instant decision is directly contrary to this same court's opinion in *Re Diversey Bldg. Corporation,* 86 Fed. (2d) 456, where the District Court entered an injunctive order in a 77B proceeding involving the Diversey Building Corporation, which enjoined the prosecution of suits against one Becklenberg, a guarantor of a bond issue. The plan of reorganization there contemplated, among other things, the release of Becklenberg from his original guaranty. The question there presented was whether the District Court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the reorganization plan

which had been approved by the court after its acceptance by two-thirds in the amount of allowed and affected claims of each class of creditors, but which had not been accepted by appellants who were bond holders of the original bond issue.

In answering that question in the negative, this same court, through Judge Sparks, said that its attention had "not been directed to any section of the bankruptcy act which would authorize the issuance of this injunction," and further stated (pp. 457, 458):

> "The trouble here is that the court exceeded its jurisdiction with respect to the subject matter before it. Appellants were in no way interfering or threatening to interfere with the court's jurisdiction of the debtor or its estate, or its lawful reorganization. Their actions and threatened actions were merely in derogation of that part of the plan which proposed to release Becklenberg's guaranty of the original bonds. *Their position was sound and the court was without jurisdiction to restrain them in this respect.* It is quite true that a continuation of appellants' activities might have frustrated the approved plan, but if so, it was because it was too extensive in its scope. It not only purported to reorganize the debtor's estate by reducing the amount of its debt and interest and extending the time of payment, but it also essayed to reduce the indebtedness of Becklenberg and extend his time for payment. *His estate is not subject to reorganization under section 77B, and he can not modify his obligations by the reorganization of other insolvents.* The only relief which he may seek under the Bankruptcy Act, with respect to his debts, is to be found under Section 74 as amended on June 7, 1934 (11 U.S.C.A. Sec. 202), and the provisions of the act as it existed before that amendment; and he is not entitled to relief under those provisions until he tenders his estate to the bankruptcy court for administration, and es-

tablishes the fact that he is insolvent, or is unable to meet his debts as they mature. None of these facts appear, hence the court was without jurisdiction to make the order complained of insofar as is affected the original guaranty of Becklenberg." (Italics ours)

The same is true at bar. Neither the City of Chicago nor the Chicago Transit Authority was subject to reorganization in the proceedings which involved the Chicago Railways as a debtor, and the District Court was, therefore, without jurisdiction to modify their liabilities or obligations by the reorganization of other insolvents.

The instant decision is contrary to the decision of the Second Circuit in *Re Nine North Church Street, Inc.*, 82 Fed. (2) 186, cited with approval in the *Re Diversey Building Corporation* case (p. 458). There the question arose as it arose in the case at bar. A motion was filed to vacate an injunction restraining the prosecution of a suit pending in the state court against the Maryland Casualty on its guaranty of a mortgage debt, which under the debtor's plan of reorganization, had been reduced. The injunction prohibited the suit on the guaranty except as reduced by the plan. The motion to vacate the injunction was denied by the District Court, and, in reversing, the Second Circuit said:

"Section 77B is part of a general amendment to the Bankruptcy Act for the relief of debtors. Its provisions are conditioned upon a showing by the corporate debtor of facts evidencing need for relief and that the corporation is insolvent or is unable to meet its debts as they mature. By its guaranty, Maryland promised to meet certain obligations and these are not affected by reorganization of this debtor. Any modification of this contract can only be justified by the bankruptcy power which extends only to the relief of insolvent or hard pressed debtors. If

Maryland is in that class, it must come into court and establish the fact. It cannot modify its obligations by the reorganization of other insolvents.

The debtor's argument that the certificate holders' rights against Maryland must be modified to allow a reorganization of this debtor is unconvincing. If the certificate holders collect on their guaranty, then Maryland will have a claim against the debtor. The reduction of this claim may be essential to a reorganization of the debtor. If it takes place, the debtor will be relieved by the reduction. Maryland will no doubt be dissatisfied since it must bear the burden of the reduction. But that is as it should be. Maryland assumed the guaranty and must now be held to it. To allow a guaranty to be modified every time the principal debtor found itself in financial difficulties would be to make a guarantor's obligation nominal only. The very purpose of, and only value in a guaranty is as a protection against the principal's inability to pay. Without a reorganization of the guarantor and a showing that its financial conditions justify relief from its obligations, the contract between the obligees and the guarantor is inviolate."

At one time during the course of the argument on the motion to dismiss the appeal, the Court appeared to agree with our contention. After indicating that there was only one possibility of the injunctive order "being construed beyond its application to this debtor, the street car company", and after referring to that language in the injunctive order (R. 132), Judge Evans stated (R. 133):

"Now it would seem as though it would be far fetched under this question to say that the Court was passing upon the reorganization of the debtor should have included by its injunction a restraint upon your clients or creditors against some third party that they may have added, because the injunction was di-

rected to the reorganization of the debtor alone. *That was not the question that was before the Court.* The Court was trying to reorganize the debtor pursuant to a plan that had been presented which called for a sale of a large piece of property with many claims, and no one should be permitted to follow that with one of these claims as the sale takes place to the detriment of the sale or the harassment of the purchaser. Suppose you should have had a guarantee from me that if we bought those bonds, do you think that this kind of a proceeding would enjoin you from suing me". (Italics ours)

Thereupon, petitioners' counsel stated that the parties were in accord that the literal language of the injunctive order prohibited petitioners from "prosecuting any action against the City of Chicago, the guarantor or the purchaser". And Judge Evans stated that if the action was against the City of Chicago, "it would completely interfere with the plan". Thereupon petitioner's counsel read from the opinion in the *Diversey* case (ante p. 39) and Judge Evans observed (R. 137):

> "I don't think there can be any complaint about the ruling you have read. I can not see how in the reorganization of one debtor that if there is some suit or some claims between one of the creditors and some third party, that the Court has anything to do with that but it might have something to do with the reorganization of the debtor; and in everything that relates to the reorganization of the debtor it does have jurisdiction, and in some instances it might have, and I can see how it could have where as a practical proposition the third party is present and really vitally interested in the plan of reorganization and whether they should be permitted to pursue its claim against the said party might be a legitimate basis of jurisdiction and a relieving order.

> As a general proposition, as between "A" and "B", there could be cases where "B" the creditor might be barred from any claim against "A" but there might be a claim against "C". That is the way that case held and that is clearly right."

In other words, the fact that the third party was "present and really vitally interested in the plan of reorganization" would furnish "a legitimate basis of jurisdiction and a relieving order" against the pursuit of a claim against such third party, according to the Court. It is obvious that the Court completely misunderstood its prior decision in the *Diversey* case (*ante,* p. 39) because the third party there (Becklenberg) was a party to and vitally interested in the reorganization as it contemplated his release from the guaranty of the old bond issue in consideration of his guaranty of the new one contemplated by the plan. And the decision is directly contrary to that of the Second Circuit in *Re Nine North Church Street, Inc.,* 82 Fed. (2d) 186 for the same reason.

There would be no point to the assurances given persons who invested in reliance upon the provisions of the Ordinance if the City could escape its obligation merely because the principal debtor became insolvent and it became interested in such insolvency. The Ordinance doesn't say that the properties will be resold at the ordinance price after February 1, 1927, except in case the Chicago Railways goes bankrupt. If the only security which Series B Bondholders had in the reorganization affected by the 1907 ordinance was the solvency of the Chicago Railways, what point is there in the Ordinance? And it is to be recalled that, in construing the ordinance and statute in question, Judge Wilkerson stated that the ordinance manifested *"a clear intention,* not only to provide terms and

conditions covering the City's consent to use of City's streets during the grant, but also *to provide assurance legally obligatory on the City for the protection of the investment,* 'at and after' as well as 'during' the term expiring February 1, 1927" (*Harris Trust and Savings Bank* v. *Rys. Co.* 39 Fed. (2d) 958, 960).

Now, if this case involved a mere grocery store worth Ten Thousand Dollars ($10,000.00) and someone loaned Thirty Five Hundred Dollors ($3500.00) on that store and took a mortgage on someone else's assurance that if anybody purchased that store twenty years later the purchase price would be Ten Thousand Dollars ($10,000.00), and the grocery store owner went bankrupt and someone purchased the store at the bankruptcy sale for Five Thousand Dollars ($5,000.00), no one would even listen to an argument that the assurer of Ten Thousand Dollars ($10,000.00) could have his liability extinguished in the bankruptcy decree involving the original owner who got the Thirty Five Hundred Dollars ($3500.00) in the first place only upon the faith of the assurance.

But this isn't a grocery store. It is a large public utility and instead of involving thousands, it involves millions. Being such an important case, it requires many important points and much argument on complex and confusing issues which blanket and obscure the simple homespun principle we are trying to maintain. All is lost in the pragmatism of emergency and crisis. We must protect the purchaser of this vast utility, it is only worth seventy five million, not one hundred and seventy five million, the people of Chicago will walk the streets if the traction problem is not settled immediately, the investment bankers won't purchase bonds of Chicago Transit Authority, their lawyers won't pass them, the case is

one of overwhelming impelling public interest run the arguments which thus far have denied us the right to determine whether this Ordinance of 1907 means what it says, and what Judge Wilkerson said it meant. It really seems odd that the matter is controversial.

(b) The question of whether petitioners could prosecute a suit against the City of Chicago and Chicago Transit Authority of the Character contemplated by the petitions to relax and modify had not been previously decided by the Circuit Court of Appeals in its decision affirming the District Court's approval and confirmation of the plan; and even if it was decided, being a question of jurisdiction of the subject matter, it could be reconsidered on a subsequent appeal.

The second ground of the motion to dismiss the appeals was that all "substantive questions" had been decided by the Circuit Court in its decision affirming the District Court's approval and confirmation of the plan.

To begin with, the District Judge refused to specifically hold that the matter raised by the petitions had been previously adjudicated when the tentative drafts of the orders denying the petitions specifically incorporating those findings were presented to him by respondents. He crossed them out in ink and signed the orders as thus deleted (see Petitioners' Objection 6 to Emergency Motion to Dismiss Appeals, Ante, p. 21; Rec. 85-86).

Further, an examination of the opinion of the Circuit Court of Appeals (160 F. (2) 59) will clearly disclose that it carefully refrained from passing upon the question. The matter is discussed beginning on p. ..... of the opinion. The point raised by appellants there (petitioners here) was that "the plan deprives them of contractual rights contained in the 1907 ordinance and that the Court was without jurisdiction to order the release, or reduction of

the rights of Series B bonds." The sole question was whether the plan should be approved, not whether petitioners had other and independent rights against persons not the debtor in those proceedings.

The Court concluded by saying (p. 66):

> "True, Sec. 23 (the ordinance of 1907) does provide that if, after the expiration of the ordinance, the City should grant a franchise to a new company, the new company shall buy the property upon the terms upon which the City might have purchased. Even so, that fact *under the circumstances of this case, is no reason why the plan should not be approved since all contingent rights of a debtor* pass to its trustee and become a part of its estate (citation) and may be dealt with in Chapter X proceedings" (italics ours).

Observe the guarded character of the language in italics. The question raised by this appeal has nothing to do with the approval of the plan. Neither are we claiming any contingent rights of or against the debtor. We concede those rights are subject to extinguishment in a Chapter X proceedings. Was that Court saying that we had no independent rights against the City or the Transit Authority under the Ordinance passed pursuant to statutory authority? Was that Court composing and extinguishing liabilities under that Ordinance of persons other than the debtor? Particularly so in a case were no Illinois Court had passed upon that question? That Court was merely deciding whether "the plan should not be approved," and was merely composing and extinguishing the "contingent rights of a debtor."

It had no jurisdiction to do anything else as we have pointed out. And if it did actually decide that the City of Chicago and the Chicago Transit Authority had no liability to us under that Ordinance, having no jurisdiction

so to do, the question can be raised again for jurisdiction over the subject matter can be raised at any time and in any proceeding.

In *Sheldon* v. *Wabash R. Co.*, 105 Fed. (2d) 785, 786, the District Court, upon consideration of a demurrer for want of jurisdiction of the subject matter, laid down the rule that the question is always open for determination,

> "even though there may be in the case prior rulings of the same or another judge sustaining the jurisdiction."

In *Blossfield* v. *Pacific Tank Pipe Co.*, 15 Fed. (2d) 889, a motion to dismiss the complaint for want of jurisdiction had alreay been denied when the matter was again suggested upon motion. Dismissing the suit, the court said (p. 890):

> "Plaintiff argues that the oral ruling has become the law of the case and that it therefore may not be set aside. Were not the jurisdiction of the court in question, this must have been conceded * * * It would be not only an extraordinary but a useless thing to permit the trial of a case which, on the allegations of the complaint, must be dismissed for want of jurisdiction at the close of the plaintiff's case, which, if not then dismissed, must be dismissed, on the court's own motion (citation), at any time before entry of a final decree at which the lack of jurisdiction was suggested; and which, on appeal, would be dismissed, rather than reviewed, because of lack of jurisdiction in the trial court (citations)."

In *Connet* v. *City of Jerseyville*, 110 Fed. (2d) 1105, lack of jurisdiction had been suggested on rehearing before this same Court (two of the instant judges sitting) and rehearing denied. Want of jurisdiction was urged upon a second appeal, and the Court considered whether

appellant was prevented from raising that question by the rule of the law of the case, saying (p. 1108):

> "Regardless of the effect of our previous decision we are of the opinion that 'when the jursidiction of the court as a federal court is called in question, liberality of practice should be indulged, to the end that the question may be indubitably heard and determined.'"

And, after noting the distinction between the law of the case and *res judicata*, that the first directs discretion and is a question of submission, whereas the second supersedes and compels judgment and is a question of power, the Court said that law of the case does not limit the power of the court to reopen what has been decided, and reconsidering the question "regardless of the effect of our previous decision," held that the District Court had no jurisdiction of the subject there in question.

The Circuit Court on the appeal from the orders approving the Plan scrupulously avoided the question of jurisdiction to deal with petitioners' rights against the City and the Transit Authority. By their petitions to modify and relax the injunction, petitioners directly challenged the District Court's jurisdiction; and the appeals to the Circuit Court squarely raise that question. That question ought to be finally and decisively settled; and the second ground in support of the motion to dismiss, that all "substantive questions" had been decided on the appeal from the orders approving the Plan is entirely without merit.

(c) The orders appealed from were appealable orders.

The first ground of the motion to dismiss was that the orders were not appealable. The orders from which the appeals were taken were entered upon a hearing in bankruptcy, as the orders themselves indicate. They denied and dismissed the petitions to modify and relax the in-

junction contained in the order of sale. It is clear that the injunction was interlocutory as were the orders denying modification thereof, for the sale had not been consummated, even at the time the appeals were dismissed, as shown by the motion to dismiss and oral argument in support thereof. Moreover, by the terms of the injunction itself, set forth in the petitions to modify, the court reserves jurisdiction over matters yet to be adjudicated.

Such being their character, the orders denying and dismissing the petitions to modify were appealable under Section 129 of the Judicial Code (29 U. S. C. 227). This is true though the application to modify is a rehearing of the original application for the injunction. *American Grain Separator Co.* v. *Twin City Separator Co.*, 202 Fed. 202, 205. The fact that Congress made no exception as to rehearings is conclusive that none was intended, and it is not the province of the courts to do so. *American Grain Separator Co.* v. *Twin City Separator Co.*, 202 Fed. 202, 205.

Just such an order as those at bar was appealed from in *Re Nine North Church Street*, 82 Fed. (2d) 168, a bankruptcy matter, raising precisely the question raised by these appeals. And orders in bankruptcy like those at bar have been expressly held appealable under Section 129 of the Judicial Code. (*McGonigle* v. *Foutch*, 51 Fed. (2d) 455, 459-460; *Molina* v. *Murphy*, 71 Fed. (2d) 605, 606.) This ground in support of the motion is therefore without merit.

(d) Petitioners have an interest in the subject matter of their appeals.

The third and final ground for the motion was that petitioners had no appealable interest in the subject matter "of this appeal." The subject matter of these appeals

was the validity of the orders refusing to modify the injunction so as to permit petitioners to sue the City of Chicago and the Chicago Transit Authority. Petitioners' interest in that subject is certainly clear. The appeals had nothing to do with the assets in Bankrupcty, in which petitioners admittedly have no interest. If anyone has an interest in the appeals it would be the petitioners, the City of Chicago, the Chicago Transit Authority, and no one else. The third ground in support of the motion is plainly without merit.

4.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionality and construction of those state laws which, in the absence of authoritative state decision, should be left for decisions in appropriate proceedings in the state courts.

It seems rather obvious that the question of whether petitioners have a cause of action of the nature asserted is a question which depends solely upon the constitutionality and construction of the Ordinance of 1907 and of the Mueller Act of Illinois, pursuant to which the Ordinance was passed. A decision of that question by a Federal court would not be determinative if a state court should say that its statute and ordinance meant something different than the Federal court said it meant. Under the doctrine of *American Federation of Labor* v. *Watson*, 327 U. S. 582, and related cases, the Federal courts should refrain from passing upon the constitutionality and construction of state laws until the state courts have had an opportunity to pass upon them. There this court refused

to enjoin the enforcement of the closed shop provision in the Florida constitution, reversed a District Court injunction and remanded the case with directions to retain the bill pending a construction by the state courts, saying (p. p. 595, 596):

> " • • • The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

The case at bar is even stronger for here we are enjoined from *even prosecuting* our asserted action in the state court. Unless this injunction is modified or we are willing to hazard a criminal contempt, the state courts will never get an opportunity to pass upon what is solely a question of state law. To the same effect is *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, where in a bankruptcy proceeding the question of a fee simple ownership of a right-of-way to Illinois land was adjudicated. This Court, through Mr. Justice Black, reversed and remanded

> " • • • To the District Court with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right-of-way to the Illinois state courts." (p. 484).

5.

The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the federal courts.

We have heretofore in the statement of the case set forth the nature of the causes of action asserted (*ante*, p. 14). The Illinois Supreme Court has held this Ordinance to be a contract between the parties. Thus, in *Chicago Rys. Co.* v. *Chicago*, 292 Ill. 190, the court said (pp. 201, 202):

> "It is generally held by courts that when a privilege or right to use a street for a lawful purpose is granted by a municipality for an adequate consideration by an ordinance which is accepted and acted upon by the grantee, *it is not a mere license but becomes a contract binding upon the parties from which neither can recede*, and this court has declared that rule in various cases. (*Chicago Municipal Gas Light Co.* v. *Town of Lake*, 130 Ill. 42; *Village of Madison* v. *Alton, Granite and St. Louis Traction Co.*, 235 id. 346; *People* v. *Chicago Telephone Co.*, 245 id. 121; *City of Springfield* v. *Interstate Independent Telephone and Telegraph Co.*, 279 id. 324.)" (Italics ours)

Again in speaking of this ordinance, in *Chicago City Ry. Co.* v. *Chicago*, 323 Ill. 246, the court said on page 254:

> "It is true that the ordinance constitutes a contract, the obligation of which cannot be impaired; that the rights conferred by it are property in the nature of real estate, of which the appellant cannot be deprived without due process of law and which cannot be destroyed, abridged or damaged for the public use without just compensation."

While up to the present time no Illinois Court has held that the ordinance constituted a contract not only between the Railways and the City but also between the City and those persons who invested their money in reliance upon the terms of that ordinance for the reason that the question has never been presented to an Illinois court, yet it is irrefutable that the ordinance was passed for the direct and immediate benefit of those persons who so invested their money upon the faith thereof. Judge Wilkerson expressly so held in *Harris Trust and Savings Bank* v. *Chicago Rys. Co.*, 39 Fed. 2d 958, 960 (the City was a party) when he said that the Mueller law and this ordinance, passed pursuant to the authority thereof, manifested " a clear intention . . . to provide assurance, legally obligatory upon the City, for the protection of the investment."

In *Carson Pirie Scott and Co.* v. *Parrett*, 346 Ill. 252, the court said (p. 257):

> "The rule is settled in this State that if a contract be entered into for a direct benefit of a third person not a party thereto, such third person may sue for breach thereof. The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon. This rule has been announced without variation in numerous cases decided by this court. *Kinnan* v. *Hurst Co.*, 317 Ill. 251; *Vial* v. *Norwich Union Fire Ins. Society*, 257 id. 355; *Searles* v. *City of Flora*, 225 id. 167; *Harts* v. *Emery*, 184 id. 560; *Webster* v. *Fleming*, 178 id. 140; *Lawrence* v. *Oglesby*, id. 122; *Crandall* v. *Payne*, 154 id. 627; *Bay* v. *Williams*, 122 id. 91; *Dean* v. *Walker*, 107 id. 540; *Snell* v. *Ives*, 85 id. 279; *Bristow* v. *Lane*, 21 id. 194; *Brown* v. *Strait*, 19 id. 88; *Eddy* v. *Roberts*, 17 id. 505."

Obviously it is not within the province of the Federal court to determine whether this ordinance was entered into for the direct or incidental benefit of third persons in the event it should be held that our primary claim, namely, that this ordinance constituted a contract between the City and the persons who gave up their securities in reliance upon its terms, was untenable.

Now these Illinois decisions, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 80, and related cases, were binding upon the Federal court. The effect of the decisions of the Illinois Court is thus plain, and controlling force in the determination of whether petitioners have the causes of action set forth in the petition.

CONCLUSION.

Unless this writ is granted and the order of the Circuit Court of Appeals reversed, petitioners will be forever precluded, under penalty of criminal contempt, from prosecuting a plenary action in the state court of the character indicated herein. And this without any authoritative decision from the state court with respect to the liabilities of the City under the Ordinance or that of a purchaser of the property contrary to the provision of said Ordinance. Looking at the case with a 1907 perspective is what is required, for if liabilities of the character here urged were then created, those liabilities exist today for unforeseen economic events do not defeat engagements solemnly induced or invited unless the person seeking to defeat those engagements tenders his estate to a bankruptcy court,—not the estate of another. We respectfully submit that the writ should be granted for the reasons indicated herein.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX.

The Mueller Act, L. 1903, p. 285:

"Section 1. That every city of this State shall have the power to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits, and to lease the same or any part of the same to any company incorporated under the laws of this State for the purpose of operating street railways for any period not longer than twenty years on such terms and conditions as the city council shall deem for the best interests of the public.

"But no city shall proceed to operate street railways unless the proposition to operate shall first have been submitted to the electors of such city as a separate proposition and approved by three-fifths of those voting thereon. It shall be lawful for any such city to incorporate in any grant of the right to construct or operate street railways a reservation of the right on the part of such city to take over all or part of such street railways, at or before the expiration of such grant, upon such terms and conditions as may be provided in the grant; it shall also be lawful to provide in any such grant that in case such reserved right be not exercised by the city and it shall grant a right to another company to operate a street railway in the streets and parts of streets occupied by its grantee under the former grant the new grantee shall purchase and take over the street railway of the former grantee upon the terms that the city might have taken it over and it shall be lawful for the city council of any city to make a grant containing such a reservation, for either the construction or operation or both the construction and operation of a street railway in, upon and along any of the streets or public ways therein, or portions thereof, in which

street railways tracks are already located at the time of making of such grant, without the petition or consent of any of the owners of the land abutting or fronting upon any street of public way, or portion thereof, covered by such grant."

• • •

"For the purpose of acquiring street railways either by purchase or construction as provided for in this Act, or for the equipment of any such street railways, any city may borrow money and issue its negotiable bonds therefor, pledging the faith and credit of the city; but no such bonds shall be issued unless the proposition to issue the same shall first have been submitted to the electors of such city and approved by two-thirds of those voting thereon, nor in an amount in excess of the cost to the city of the property for which said bonds are issued ascertained as elsewhere provided in this Act and ten (10) per cent of such cost in addition thereto. In the exercise of the powers, or any of them, granted by this act, any such city shall have the power to acquire, take and hold any and all necessary property, real, personal or mixed for the purposes specified in this Act, either by purchase or condemnation in the manner provided by law for the taking and condemning of private property for public use but in no valuation of street railway property for the purpose of any such acquisition except of street railways now operated under existing franchises shall any sum be included as the value of any earning power of such property or of the unexpired portion of any franchise granted by said city. In case of the leasing by any city of any street railway owned by it, the rental reserved shall be based on both the acual value of the tangible property and of the franchise contained in such lease, and such rental shall not be less than a sufficient sum to meet the annual interest upon all outstanding bonds or street railway certificates issued by said city on account of such street railway."

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 492

NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

REPLY OF PETITIONERS TO BRIEFS OPPOSING CERTIORARI.

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ARGUMENT.

May It Please the Court:

Statement.

All argument to the contrary notwithstanding, the indisputable fact remains that if remedy is denied these petitioners, no one will ever know from an Illinois court

what Illinois intended when she permitted Chicago to pass the ordinance of 1907. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, will be ignored and it will never "appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the state which in such matters is supreme" (Black, J., 309 U. S. 478, 484).

Illinois will never be accorded the opportunity of saying that when she passed a legislative act permitting her city to induce persons to invest their money on the faith of the ordinance, that she meant that the terms of the ordinance should be abided and that persons who violated same should be liable therefor. Illinois should be permitted to pass upon Illinois matters. If Kansas construes Kansas wills (*Scott* v. *Gillespie*, 103 Kan. 745, 176 P. 132, certiorari denied 249 U. S. 606, cited with approval in the *Thompson* case, 309 U. S. 484), why shouldn't Illinois construe Illinois contractual ordinances (*Chicago City Ry. Co.* v. *Chicago*, 323 Ill. 245, 252)? And when a municipality of Illinois by ordinance induces persons to invest their funds on the ordinance assurance, an attempt by those persons later to have the city's liability under the ordinance and that of a person coming within its terms (neither of whom are bankrupts) settled by an Illinois court should not be labeled "an attack on the integrity of the federal judicial process" (C. T. A. Br. 34).

We are not attacking anyone's integrity. Neither do we like ours attacked. We are trying to protect what interests our clients have left after investing $16,000,000.00 upon the faith and integrity of the ordinance with its "bizarre value formula" (C. T. A. Br. 31). We wonder how "bizarre" it looked in 1907. Then the ordinance was

considered a method of assurance to investors who invested in reliance thereon. In a calmer moment, it manifested a "clear intention to provide assurance *legally obligatory upon the City* for the protection of the investment" (*Harris Trust & Savings Bank* v. *Chicago Rys. Co.*, 39 Fed. (2d) 948, 960; Orig. Br. 43, 44). Now we must ignore those investors "because the people residing in the Metropolitan area of Chicago, acting through Chicago Transit Authority, have acquired the transportation lines in reliance upon the orders and decisions of the federal courts. The Authority, and the City should not be harassed by nuisance suits which seek to relitigate issues that have been argued and disposed of repeatedly in the course of reorganization proceedings" (C. T. A. Br. 13). Illinois is to be denied the right to decide Illinois questions, persons not debtors in the federal court are to have their liability under Illinois law composed and extinguished by the simple device of a federal court injunction! Not so much as a lawsuit in the state court will these later investors allow the former ones, so important is it that the investment of the later ones be protected.

The reorganization is now a *fait accompli*. It can now be ignored and forgotten. The fact that we are still trying to preserve our clients' rights makes hollow characteristic, intemperate remarks of the opposition like the following: "Was it only coincidence that they waited until the day before consummation to file their notices of appeal? The answer, of course, is that they are primarily concerned with blocking the plan. No other conclusion can be reached after considering the tactics they adopted" (C. T. A. Br. 26, 27); "it was becoming apparent that petitioners were trying to prostitute the appellate processes of the federal courts" (C. T. A. Br. 28).

The reorganization was carried on with utter disregard to the question of the right of an Illinois court to pass upon liabilities arising under Illinois law. Regardless of anything that has or can be said, the fact remains that no resort to any Illinois court was had to determine whether persons who relied upon the faith and integrity of the ordinance were parties to the contract created thereby or third party beneficiaries thereof (Orig. Br. 17) and the liability of the City or anyone who violated that ordinance to those persons. What Illinois meant by that ordinance was of no concern then and appears to them to be of no concern now. Is this court going to decide that we are trying to make "the fantastic assumption that the City of Chicago (which in the first place obviously would have no power to do so) guaranteed the B bondholders that they would get their money back in full even if the company became insolvent" (C. T. A. Br. 30) by denying this petition? Is this court going to now decide the matter in parenthesis, namely that the City obviously had no power to be a guarantor under the ordinance by denying this petition? In fact, the ordinance was specifically held not to be an *ultra vires* act of the City in *Venner* v. *Chicago City Ry. Co.*, 236 Ill. 349, 359, 361. Is this court going to decide that "the *Parrett* case (346 Ill. 252) and the law of third party contracts obviously does not apply to the 1907 ordinance" (C. T. A. Br. 32)? Is this Court going to accept quotations from Williston (C. T. A. Br. 32, 33) able and authoritative as he is, as the Illinois law of third party contracts? Are any of these questions federal questions? Couldn't Illinois decide them? And if she did, wouldn't the federal courts be bound to follow the decision?

Were all of those questions decided in the reorganization proceedings? And if they were, did the federal court

have jurisdiction to decide them? Obviously they must have been decided and the court must have had jurisdiction to decide them if the broad, sweeping injunctive order is valid. That's what this case is about. It isn't about the reorganization. We were cut out of that. The functions and purposes of that proceeding were to compose and extinguish the liability of the person or persons who tendered their estates to that court—not the estate of someone else. The court's sole jurisdiction there was to determine whether we could get any part of our $16,000,000.00 from that bankrupt. It held that we couldn't. We are now trying to get it from someone else. Could it jurisdictionally hold that we *couldn't even* try to get it from that someone else?

Respondents have much to say about these questions having been previously decided (C. T. A. Br. 2, 3, 6, 7, 8, 11, 12, 16, 20, 21, 22, 23, 24, 31; B. C. Br. 1, 2, 3, 5, 9, 10, 12); nothing about the jurisdiction of the court to decide them. Our argument on jurisdiction and the authorities cited (Orig. Br. 38-45) are noted on page 30 of the Transit Authority brief as inapplicable on the question of diversity of opinion among the Circuit Courts of Appeals—ignored as to the jurisdictional question. The other brief ignored the question completely. Not one case is cited in either brief showing that a federal court jurisdictionally could decide these questions.

As to whether these questions were previously decided, respondents are content to ignore the fact that if we had been permitted to have in the record on appeal those matters called for by our designation it would have shown that Judge Igoe had refused specifically to find that these questions presented by the instant appeals had been previously decided. He refused to find that the instant pe-

titions were "for rehearing of objections which the petitioners heretofore have made to the plan of reorganization heretofore approved and confirmed and to the order of sale heretofore entered herein, and presents matters heretofore heard and adjudicated by this court and by the courts of appellate jurisdiction, and the same should be denied" (R. 69, 70). This fact alone exposes the Achilles heel of respondents' argument. It would have been further apparent that if the other matters called for by our designations had been in that record, that this question had never been and could not have been decided (R. 70). Why, the ordinance upon which our claim is based wasn't in the record although it was attached to the petitions when filed in the District Court. Properly a part of the petitions, it was not incorporated in the short record on appeal.

Furthermore there was nothing in that short record on appeal to indicate that the matter had been previously decided. The attempt to urge that question was based upon unverified assertions in the emergency motion to dismiss. Do those statements become part of the record on appeal? Can I by a motion in the case add matters to the record not appearing in the record as transmitted by the Clerk of the District Court? My motion can be based only upon matters in the record on appeal as called for by the Rules of Civil Procedure, not upon unverified assertions in the motion. Otherwise why file a record at all?

The foregoing observations should place in greater relief the fact that respondents not only ignored our designation of record in making up their short record, but, to support their position here they indiscriminately endeavor to incorporate in this record on appeal the following:

(1) The unverified alleged factual statements contained in the emergency motion to dismiss (R. 55).

(2) The appeals from the order of sale. (It would have been simple to have incorporated that in the short record here and it is not unreasonable to assume that if those appeals presented the same questions respondents would have done so, Judge Igoe to contrary notwithstanding) (C. T. A. Br. 16; B. C. Br. 5).

(3) The efforts of Chicago Transit Authority to market its bonds and the result (C. T. A. Br. 9).

(4) Petitioners' certiorari petition to this court to review the order affirming the District Court's approval of the plan (C. T. A. Br. 21).

(5) Petitioners' suggestions in opposition to the motion to dismiss the appeal from the order of sale (C. T. A. Br. 22).

Now all in the world that the short record on appeal actually contained was:

(1) The instant petitions (R. 2, 19).

(2) Petitions to set claims for hearing (not involved here at all) (R. 35).

(3) Orders denying instant petitions (R. 42, 44). (These they didn't transcribe properly as they showed on their face that Judge Igoe refused to hold the petitions ones for rehearing, etc., R. 69, 70.)

(4) Orders denying petition re claims (R. 43; not involved here at all).

(5) Notices of Appeal (R. 45, 46, 47).

(6) Appellees' joint designation of record (R. 48).

(7) Certificate of Clerk (R. 51).

On the face of it that record couldn't conceivably have been sufficient to warrant a dismissal, much less support the arguments contained in respondents' brief in opposition here.

Within the narrow limits of a reply, it is impossible for us specifically to call attention to the repeated assertions

in both opposing briefs unsupported by the short record. They pervade almost every page of those briefs. Note the absence of record references in their statement of the case (C. T. A. Br. 4-11). We here assume that our rights are as important as the rights of persons not parties to these proceedings (C. T. A. Br. 34). Furthermore, we are not seeking to compel the City and the Transit Authority "to pay $100,000,000 more than the plan purchase price" (C. T. A. Br. 34), if the effect of the decision is apposite. We are merely seeking to recover the $16,000,000 we never would have invested if we had known that the ordinance could be ignored and the City and any violator thereof escape liability in a bankruptcy proceeding in which neither was a debtor (C. T. A. Br. 34).

It is said that $75,000,000 has been paid for these properties and in effect that no more should be paid (C. T. A. Br. 34). If this be important, perhaps the full story should have been told, namely, that the Transit Authority, when it sold its $105,000,000 of bonds (B. C. Br. 3), represented in its prospectus to "the bond buying public," who now "should not be harassed by nuisance suits" (C. T. A. Br. 13), that the value of these properties was $171,384,169, the ordinance price as of January 31, 1945 (R. 8, 9), computed according to "its bizarre value formula!" The date of this prospectus was July 10, 1947 (R. 8)!

With these prefatory observations, we pass to a consideration of the substance of the opposing briefs. Inasmuch as the brief of the Bondholders' Committees (B. C.) is merely a restatement of that of the Chicago Transit Authority (C. T. A.), we will reply to contentions of Respondents as set out in the C. T. A. Brief. Neither brief makes any attempt to specifically answer our argument

in the order set forth in our brief; but instead, the C. T. A. brief argues five points:

I. The court did not err in dismissing the appeals because:
   A. The orders were not reviewable;
   B. Petitioners had no equity in the Debtor;
   C. Petitioners' contentions had been decided adversely to them on prior appeals.

II. The short record contained every item the court needed to pass upon the motion to dismiss.

III. Because the appeal was filed the afternoon before the day of the sale, the court was justified in dismissing it within twenty-four hours.

IV Petitioners' reasons for *certiorari* are based on a misconstruction of their authorities and on a complete misconception of the reorganization proceedings involved.

V. The City and the Transit Authority should not be harassed by nuisance suits raising matters previously determined.

In this reply, we ignore Point V entirely except in so far as we have previously commented in this statement.

Returning to the Points of our argument, we next point out how the respondents have failed to answer to them.

I.

The Circuit Court of Appeals Erred In Dismissing The Appeals For The Reason That It Had Not Acquired Jurisdiction To Do So.

An Appellate Court does not acquire jurisdiction to dispose of an appeal until there has been observed the necessary steps upon which its appellate jurisdiction is premised or there has been a failure to observe same.

By way of answer to this point of our argument (Orig. Br., p. 30), respondents say that the short record was sufficient because it "contained every item needed to pass upon the motion to dismiss" (C. T. A. Br. 23—Point II), and that it was an exact compliance with Rule 75(j). Nowhere do they answer our argument that, where there is on file an appellant's designation of record and statement of points, Rule 75(j) must be read with Rule 75(g) and that, when so read, "a copy of such portion of the record or proceedings below as is needed for that purpose," as such words are used in 75(j), means "the designations or stipulations of the parties as to the matter to be included in the record; and any statement by the appellant of the points on which he intends to rely," as stated in Rule 75(g). Rule 75(g) further provides that "the matter so certified and transmitted constitutes the record on appeal" (Orig. Br. 33). Rule 75(g) is a command to the Clerk of the District Court that any designation and statements of points shall be certified as a part of the record. (Pet. Br. p. 30.) Rule 75(j) does not say that an appellee moving for dismissal can ignore an appellant's designation and statement of points on file when such appellee's designation was filed.

Unanswered is our argument that the observance of

these procedural steps was essential to the acquisition of jurisdiction by the Circuit Court of Appeals. (Orig. Br. 30-34.)

We have heretofore pointed out (p. 7) specifically that the short record did not show "that the appeals were from non-appealable orders" (C. T. A. Br. 23). It did not show "that the issues raised had been decided against them on prior appeals (C. T. A. Br. 23). These are the so-called "incontestable grounds" set forth in the emergency motion to dismiss. Obviously, that unverified motion could not augment the short record. It stood or fell upon that record.

All that the short record showed was that petitions to modify and relax an injunctive order had been filed, that orders had been entered denying same (but a true copy of the orders was not in the short record), that timely notices of appeal had been filed from clearly appealable orders (*Re Nine North Church St.*, 82 F. (2d) 168; Orig. Br. 49) that appellees (respondents) had filed a designation of short record, and that the Clerk of the District Court had certified to "a true and complete transcript of the proceedings had of *record made in accordance with the designation of Record on Appeal filed by the Appellees*" (Rec. 51).

Of this short record, respondents say, "Taking those documents, together with their knowledge of their own decisions on the former appeals, the judges, two of whom had heard both former appeals, had everything in the way of a record on which to determine the motion to dismiss" (C. T. A. Br. 24) because it is fundamental that an Appellate Court may take judicial notice of its records on prior appeals between the same parties in the same cause."

Therefore, the argument runs, the record plus the judicial notice which the court could take of its own records was such that "no additional parts of the record could possibly have avoided the unanswerable reason for dismissal" (C. T. A. Br. 24).

This argument is in the teeth of that very court's decision in *Paridy* v. *Caterpillar Tractor Co.*, 48 F. (2d) 166, where, it was unsuccessfully contended that in passing upon a motion to dismiss the Court was justified in taking judicial notice of a decree in a former case claimed to have decided the point at issue. Speaking for that Court, Judge Sparks (one of the judges here) said:

> "The decree in the former suit was, by reference, made a part of appellee's motion to dismiss, but we assume it was not attached to the bill as it does not appear in the record before us (pp. 167, 168)"
>
> "It is true that a court will take notice of its own records, but it cannot travel for this purpose out of the record related to the particular case; it cannot take notice of the proceeding in another case, even between the same parties and in the same court, unless such proceedings are put in evidence" (citations). In absence of evidence to that effect, the reviewing court cannot take judicial notice that a case before the court had connection with one formerly decided by it (p. 168)".

Obviously this is sound doctrine, for otherwise on certiorari to this Court, how could this Court know from the record the matters of which the Court of Appeals took judicial notice, and whether it erred in deciding the question, even assuming that it had the right to take such judicial notice.

Besides being invalid, their argument ignores the point raised, namely, jurisdiction to proceed (Orig. Br. 30). The

point here involved is whether, on a motion to dismiss under Rule 75 (j), there can be ignored an appellant's designation of record and statement of points on file when an appellee's designation is filed in making up the record on appeal. Jurisdiction does not depend upon the correctness or incorrectness of the result.

The question is not whether the Court had everything in the way of a record in other cases on which to determine the motion, but rather whether it had jurisdiction to determine the motion at all. The record does not even show what other records the court may have actually had. How could the court judicially know what appellants' claim was without their statement of points? Is an appellee to be permitted to determine the issues upon which the appeal is to be decided (Orig. Br. 33)?

Furthermore, the Circuit Court of Appeals did not have everything in the way of a record needed to determine the motion. Actually, they did not have a correct record because if the orders denying the petitions had been correctly transcribed they would have shown that Judge Igoe had actually deleted in ink the proposed findings incorporated therein to the effect that the petitions were *"for rehearing of objections" previously* made and that they presented "matters heretofore heard and adjudicated by this Court and by the Courts of appellate jurisdiction, and that the same should be denied" (R. 69, 70). Now, if those petitions embodied matters which Judge Igoe knew he had never decided, and in respect of which the District Court refused to make findings as requested by respondents, when and by what authority did the Circuit Court of Appeals decide them?

For this summary procedure, respondents rely solely upon Rule 75 (j), (C. T. A. Br. 25) and assumed records

in other cases. Unless that subparagraph (j) is read with subparagraph (g) of the same rule, (Orig. Br. 33) so that the matters called for by an appellant's designation and his statement of points are incorporated in the record, then an appellant is powerless to pose the issues on appeal, he is powerless to prevent an appellee from determining what the record shall contain, and he is powerless to have the case determined on the appellant's record and statement of points rather than upon a record and issues determined exclusively by an appellee. We say that a Court of Appeals cannot jurisdictionally decide an appeal in this manner.

II.

In Dismissing The Appeals, The Circuit Court of Appeals Denied Petitioners Due Process Of Law Contrary To The Fifth Amendment To The Constitution Of The United States.

Respondents attempt to answer this part of our argument (Orig. Br. 34-37) by their Point III to the effect that because our appeal was filed on the afternoon before the day set for the consummation of the plan, and because it was groundless yet "likely to upset or at least indefinitely postpone consummation," there was justification for dismissing it within 24 hours (C. T. A. Br. 26-28).

This argument answers itself. It presumes that the Court was justified in acting upon matters not in the record but upon matters contained in an unverified motion and which averred not facts but probabilities (R. 55). To appease the vagaries of the bond-buying public and their counsel, petitioners, proceeding in accordance with the Rules of Civil Procedure to effect appeals, are to be deprived of their rights under those Rules and have their appeals dismissed within 24 hours from the time they file

notices of appeal! Because of those vagaries, their counsel are to be served with notice and motion for dismissal within an hour from the time they filed notices of appeal, they can stay up until 2:30 a. m. preparing objections to the motion, argue the matter upon the convening of court at 9:30 a. m. and then be confronted with the argument that they "did not controvert a single representation of fact that had been made in the emergency motion" and that "those facts are not controverted" (C. T. A. Br. 28).

What facts? Those apprehensions and alleged probabilities appearing in the "Emergency Character" of the motion to dismiss (R. 55, 56)? We thought we answered them in Objection 8 to the Motion (R. 70, 71).

If we didn't we will answer them now. What difference could the outstanding appeal have made to the question of the consummation of the sale? Those lawyers must have known that we were entitled to a petition for *certiorari,* if the decision be adverse. Might they not be reasonably apprehensive of that also? Furthermore, the petitions showed on their face that we were not attacking the Plan. How could we have blocked it? And by the way, whose rights should have been protected? Those of parties to the case or outside parties? As it was we filed the appeal before we had to. Counsel had worked day and night to get it ready (R. 97, 98) so that no one could say "that we stood idly by and let this sale go through without asserting our rights" (R. 99).

Actually, we were showing more consideration than is being shown us here when one has the temerity to argue that the interests and probable activities of persons not parties to the record are so vast and important as to justify the dismissal of an appeal within 24 hours from the time the notice of appeal is filed in the District Court!

We find our due process argument (Orig. Br. 34-37) unanswered by authority (C. T. A. Br. 26-28).

III.

The Circuit Court Of Appeals Erred In Sustaining The Emergency Motion To Dismiss The Appeals.

A.

The District Court did not have jurisdiction to issue an injunctive order restraining the prosecution of the suits contemplated by the petitions to relax and modify said injunctive orders.

No effort is made by respondents to specifically answer the jurisdiction argument. We claim rights not against the debtor, but against persons other than the debtor. *Diversey Bldg. Corporation,* 86 F. (2d) 456, and *Nine North Church Street, Inc.,* 82 F. (2d) 186 (Orig. Br. 38, 40), squarely holding that a bankruptcy court cannot extinguish or modify the obligations of persons not bankrupt in the proceeding, are said to be "not in point" (C. T. A. Br. 30). But nowhere do respondents cite any cases which hold that a bankruptcy court has jurisdiction tc extinguish or modify the liabilities of persons not debtors in the proceeding.

B.

The question of whether petitioners could prosecute a suit against the City of Chicago and the Chicago Transit Authority of the character contemplated by the petitions to relax and modify, had not been previously decided by the Court of Appeals in its decision affirming the District Court's approval and confirmation of the plan; and even if it was decided, being a question of jurisdiction of the subject matter, it could be reconsidered on a subsequent appeal.

Respondents attempt to answer this point under their Point IC (C. T. A. Br. 20). They say that we cannot

disguise the fact that our "claims have been passed on and rejected twice previously by the Circuit Court of Appeals and were urged once before in this Court without success" (C. T. A. Br. 20). That not appearing in the short record on appeal, respondents augment that record by quoting from petitioner's certiorari petition in this Court in the former case, and their objections to the other "emergency" motion to dismiss the appeal from the order of sale (C. T. A. Br. 21). Passing for the moment that Judge Igoe refused to find that the instant petitions were for rehearing of matters previously decided and following respondents outside this record to the briefs on the *certiorari* mentioned, it can there be conclusively demonstrated that their contention is invalid. *Infrequent it is that you can cite an opponent's brief to sustain your position, but that is the fact here.*

They say that if our contentions are sustained the plan would be disrupted completely, that instead of $75,000,000.00, the City of Chicago or the Transit Authority would have to pay some $172,000,000 for the properties and in bold face type they proclaim that:

> "Obviously the Circuit Court of Appeals could not have affirmed the approval and confirmation of the plan calling for a purchase price of $75,000,000.00 without necessarily holding that neither petitioners nor anyone else had a right to insist on a purchase price of $172,000,000.00" (C. T. A. Br. 20).

In the first place, we are not insisting upon a purchase price of $172,000,000.00. So that premise fails. We are asking for a determination of our contractual rights under the ordinance against persons other than the debtor. Further, the fact that respondents still think that we are insisting upon the ordinance price proves conclusively that only the question of ordinance price was involved in the

prior proceedings. This is further conclusively demonstrated on pages 13 and 15 of the brief of these same Bondholders' Committees in opposition to certiorari filed in this Court in the former case (*In Re Chicago Rys. Co.*, Oct. Term, 1946, Nos. 1200-1205).

That it was evident that all questions which might eventuate out of a case of this magnitude were not being then decided, particularly with reference to the liabilities of persons other than the debtor, is also conclusively illustrated on page 16 of that brief, wherein these Committees say:

> "If, as and when the Authority, armed with its franchise, undertakes a campaign to compete with the Surface Lines, these questions—which will be moot if the present plan succeeds—may be raised and faced in the State Courts of Illinois."

Now the question that they then said could be raised and faced in the State Courts of Illinois was whether the Transit Authority was a "licensee" or "another company" and thereby bring it within the provisions of the ordinance, *one of the questions which we are seeking by the petitions to raise in the State Court* (R. 27).

It is apparent that the Circuit Court of Appeals didn't pass on the questions raised by the petitions (Orig. Br. 45-47). It is further apparent that the District Court had jurisdiction to reorganize the debtor, it had jurisdiction to order its properties sold and its liabilities extinguished and nothing in any ordinance could preclude it from so doing. If persons other than the debtor became liable by reasons of its so doing under the 1907 ordinance contract, of what concern was that to the Court? Those persons hadn't tendered their estate to that Court. And it is further obvious that that is all that was done in the reor-

ganization proceedings. It had no right to nullify liabilities of others than a debtor under an ordinance, contract or otherwise; its sole jurisdiction was to modify and extinguish the liabilities of the debtor and reorganize, here by sale, its assets.

And even if we proclaimed to the skies that we had "an *in personam right* against the City and the Transit Authority" (C. T. A. Br. 21) what relevancy did it have in the reorganization of another? The question there was what *"in personam right"* did we claim to have against that other. And when one considers how carefully the Circuit Court of Appeals handled the question (Orig. Br. 46): "all contingent rights of the debtor pass to its trustee," it is clear that it wasn't considering our rights against persons other than the debtor but those of the debtor alone. Particularly is this true when the injunctive order here sought to be relaxed was not entered until about two months after that opinion was filed (Orig. Br. 46).

And since respondents urge the questions raised by the instant petitions were decided in the appeals from the order of sale which were summarily dismissed upon motion, why not incorporate those proceedings in this record so that these petitioners might know, and this Court might know on certiorari, whether those appeals involved the same questions involved here (*Paridy* v. *Caterpillar Tractor Co.*, (C. C. A. 7) 48 F. (2d) 166, 167, 168)? How can this Court know the matters of which the Circuit Court of Appeals took judicial notice? Respondents made the motion for dismissal. They set forth this point in an unverified motion to dismiss (R. 63) unsupported by the short record filed. They were content to ignore the fact that the record in the District Court showed that Judge

Igoe had specifically refused to find (R. 69, 70) "the substantive questions raised by the petitions * * * were decided by this Court (C. C. A.) in its decision affirming the District Court's approval * * * of the plan and in the order dismissing the prior appeal from the order of sale" (Point II of the Emergency Motion, R. 63).

We here again note that any matters which the Circuit Court may have noted in other cases, cannot be a part of the record before this Court under its Rule 38(1). And all of this would have been more readily apparent if we had been permitted to bring up our record to the Circuit Court as appears from the companion case, namely, our motion for leave to file our petition for mandamus, contemporaneously filed with this petition for certiorari (Miscellaneous No. 259, Pet. 24-33), and brief filed in support of our motion for leave to file same (pp. 15, 16).

Our designation of record was set forth in the petition for *mandamus* in *haec verba* (Pet. 26-30. No. 10 of Part II of that designation called for the "Findings of Fact, Conclusions of Law and Order Approving plan, filed and entered Feb. 27, 1946." That was entered by Judge Igoe pursuant to Rule 52(a) of the Rules of Civil Procedure requiring the Court to "find the facts specifically and state separately its conclusions of law thereon" in actions tried without a jury, imported into bankruptcy practice by Order 37 of the General Orders in Bankruptcy and specifically applied to Chapter X proceedings by Rule 52(2) of this Court's Rules in Bankruptcy.

Judge Igoe knew that he had not previously found or decided the questions raised by the petitions in that Finding, Conclusion and Order, and if it had been incorporated in this record on appeal, it would have been apparent to the Circuit Court of Appeals that these questions were not

decided by Judge Igoe, as it is apparent therefrom. It requires no citation to support the statement that the Circuit Court of Appeals is limited in jurisdiction to a review of the matters decided below. It has no original jurisdiction. So if Judge Igoe had not decided these questions and he refused to find specifically that he had, how could the Circuit Court of Appeals have decided them? Since respondents have belabored this question so extensively in off-record references, is it unreasonable to infer that if this question was decided in that Finding, Conclusion and Order entered February 27, 1946, that they would have quoted the pertinent provision thereof?

And how can they successfully argue, without the citation of authority, that the question of what rights and liabilities are created by a local ordinance "was not a matter of State law but of federal bankruptcy law" (C. T. A. Br. 31), and that a decision of a federal court thereon would be binding upon the State court (*Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 484)?

Why don't they answer *Re Diversey Bldg. Corp.*, 86 F. (2d) 456 (Orig. Br. 38, 39), and *Re Nine North Church St., Inc.*, 82 F. (2d) 186 (Orig. Br. 40, 41), squarely in point on jurisdictional grounds?

And why don't they answer our argument that even if all these questions had been decided, the Court being without jurisdiction to decide them, "the question can be raised again for jurisdiction over the subject matter can be raised at any time and in any proceeding" (Orig. Br. 47).

C.

The orders appealed from were appealable orders.

Respondents say that the granting or refusal of a rehearing, being within the Court's discretion, is not the subject of appeal, and argue that the orders denying and dismissing the petitions to modify the injunctive order of sale were in effect the denial of a rehearing and therefore not appealable. They cite many cases (C. T. A. Br. 14-17). Conceding the legal principle, this is no case of rehearing.

Respondents' own record fails to support them and, in fact, supports us. All that it shows are the petitions and orders entered thereon. The fact that the petitions contain an extensive verified statement of facts (R. 2-34), suggests an entirely new set of facts, not heard when the injunction was entered. The orders, incorrectly copied into the record as we have pointed out do not, in any respect, suggest a rehearing.

To fortify this sort of record, respondents, in their emergency motion to dismiss, made unverified references to the orders approving and confirming the plan (not in the record), to the appeals from the order of sale (not in the record), and to the Circuit Court's decision affirming the plan, 160 F. (2d) 59, (R. 57-58; 61-63). Now the petitions to modify involved only petitioners' rights against the City and Authority, not their rights against the debtor. Actually, the orders approving and confirming the plan and the appeals from the order of sale would, if in the record, have shown that petitioners' rights against the City and Authority were not adjudicated in those proceedings, and that the appeals from the order of sale were not even considered on the merits, but were

dismissed upon motion in much the same way that the instant appeals were dismissed. And we have already pointed out how studiously the Circuit Court avoided consideration of those rights in its decision affirming the plan (Orig. Br. 46). Moreover, when it rendered that decision on January 4, 1947 (C. T. A. Br. 8), that Court could not have reviewed the order of sale, which was not entered until March 7, 1947 (C. T. A. Br. 7).

Had we been permitted to file our own record in the Circuit Court, we would have shown that the denial of our petitions was not a denial of rehearing, but that the District Judge actually heard those petitions upon their merits and specifically refused to find in the orders that the matters presented by the petitions had been previously adjudicated. The distinction, with respect to appealability, between an order denying rehearing and an order entered, like those at bar, upon a hearing on the merits, was defined by this Court in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137-138, cited by respondents (C. T. A. Br. 15):

> "The granting of a rehearing is within the Court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. * * * On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

How could the Circuit Court decide the appealability of these orders without giving us the opportunity to show

by the record, as we would have, that they did not deny a rehearing but were entered upon a consideration of the merits of matters not previously heard and were therefore clearly appealable? The record before the Circuit Court was inadequate to determine appealibility because of that court's failure to give us an opportunity to show their appealability by our own record. For this reason alone, appealability was no ground for dismissing our appeals and respondents' argument here is without merit.

Except for their rehearing argument, respondents seem to concede that Section 129 of the Judicial Code applies to the orders. Their objection is "not based on the interlocutory nature of the orders" (C. T. A. Br. 17). They distinguish the *American Grain* case (202 Fed. 202) only on the ground that a new state of facts is there shown. We want the opportunity to show, by our record, that our petitions presented a new state of facts and that the orders were appealable under Section 129. But assuming purely for argument that the orders in effect denied a rehearing, how can one escape the unqualified terms of Section 129 and the inexorable logic of Judge Sanborn in the *American Grain* case?

Respondents' cases under Section 129 used the term "rehearing" in one sense, the *American Grain* case in another sense, fixed by the facts of those cases. Respondents' cases (C. T. A. Br. 17) asked a complete dissolution of the injunctions there involved, raising the question whether there should be any injunction at all. In the *American Grain* case, in *Re Nine North Church Street Corp.*, 82 F. (2d) 186, and at bar, the question was not whether the facts justified injunctive relief. The question was whether, injunctive relief being warranted, the injunction did not exceed its adjudicated scope and impinge

upon matters which had not been a subject of the adjudication. The *American Grain* case, which respondents' cases recognize by distinguishing it, is sound and establishes our rights under Section 129.

We might briefly remark, in reply to respondents' argument on page 18, that nothing in the mandate of the Circuit Court affirming the plan required the District Court, by injunction, to extinguish rights not affected by the plan, namely, petitioners' rights against the City and the Authority.

And even if there were some question with respect to the appealability of these orders (which we do not concede) we were still entitled to a review on the merits of that question under well settled principles of appellate procedure rather than having those appeals summarily dismissed on motion (*Bennell Realty Co.* v. *Shinner* (C. C. A. 7), 87 F. (2d) 824, 826; *Halfpenny* v. *Miller*, 232 F. 113, 115; Orig. Br. 35).

D.

Petitioners have an interest in the subject matter of their appeals.

Levelling their lances at the same old windmill, respondents insist that because we have no equity in the debtor and cannot participate in the plan, we have no interests in our appeals (C. T. A. Br. 18-20). We stated in the Circuit Court (R. 88), in our opening brief (Orig. Br. 50), and we reiterate here that we claim no such equity or right to participate; and for that reason respondents' cases have no bearing upon our position here. But we do claim rights against the City of Chicago and Chicago Transit Authority whom the order of sale enjoins us from suing. Our appeals sought a relaxation of that injunc-

tion. Could our interest in the appeals be more apparent? We note with interest the following quotation by respondents from *In Re Michigan-Ohio Bldg. Corp.*, 117 F. (2d) 191, 193:

> "Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed."

The orders denying our petitions to modify the injunction detrimentally affected our rights against the City and Authority. We sought a review of those orders, and we have an appealable interest.

IV.

The Circuit Court of Appeals erred in dismissing the appeals for the reason that the petitions presented a question of the prosecution of a suit under state laws against persons other than the debtor, which presented questions of the constitutionalty and construction of those state laws which, in the absence of authoritative state decision, should be left for decisions in appropriate proceedings in the state courts.

V.

The effect of the decision of the Circuit Court of Appeals is to ignore state decisions indicating the validity of the cause of action asserted, which decisions are binding upon the federal courts.

Respondents divert attention from these points by discussing them under their Point IV "Reasons for Certiorari" (C. T. A. Br. 28-33). We return to our points because we believe them to be of utmost importance in this case.

American Federation of Labor v. *Watson*, 327 U. S. 582; *Erie Railroad Co.* v. *Thompkins*, 304 U. S. 64; and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, are questioned (C. T. A. Br. 30-32). In citing these cases to support the proposition that the decision below is in conflict with the decisions of this Court, respondents say that we completely misconstrue the Circuit Court decision affirming the plan. They say that the Court

> "assumed the validity of the 1907 Ordinance (for the purpose of the discussion) but held that such a contingent 'right' to the Ordinance purchase price, if any existed, was the property of the debtor and could be dealt with in the reorganization proceedings. Thus, even assuming that decisions of this Court require that all laws must be construed by the state courts before the federal courts pass on them, the cases cited are not applicable because the decision here involved was not a matter of state law but of federal bankruptcy law" (C. T. A. Br. 31).

Observe the absence of any authority to support the statement.

Is the question, what rights and liabilities are created by a local ordinance, a matter of state law or federal bankruptcy law?

If the Illinois Court held that the ordinance created not only contingent rights in the debtor but also separate and independent rights to bondholders as parties to the ordinance contract or as third party beneficiaries thereof, could the Circuit Court of Appeals legally hold otherwise (Orig. Br. 51)?

If the Illinois Court held that we were direct parties to that ordinance contract or third party beneficiaries under *Parrett* v. *Carson, Pirie, Scott and Co.*, 346 Ill. 252 (C. T. A. Br. 32), would either Williston or the Circuit Court of Appeals control (C. T. A. Br. 32)?

And if the Illinois Court held that section 23 of the ordinance (R. 4) applied to the Transit Authority as a "licensee" or "another company," would a contrary decision of the Circuit Court of Appeals control?

And if it was considered necessary to the instant reorganization that the rights and liabilities of others than the debtor under the ordinance be determined, what was there to prevent "appropriate submission of the question • • • to the Illinois State Courts?" (Black, J., *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 484.)

Respondents claim that the *Magnolia* case is not applicable because the decision of local law was not necessary to carry out a plan of reorganization; whereas here it was necessary and therefore proper to construe the 1907 Ordinance before going forward with the plan. And, they say, the Court accordingly decided that any rights under the Ordinance belong to the debtor alone, thereby forming a basis for the injunction, so the argument goes (C. T. A. Br. 31).

Can they seriously contend that the question of whether the debtor railroad company owned the right of way in fee simple was not necessary to the carrying out of the reorganization plan of that debtor?

Can you reorganize a debtor without determining all of its assets?

The question in *Magnolia* was whether the debtor railroad owned the right of way in fee simple and hence the rich oil deposits beneath the surface. Could the Court have proceeded to reorganize that debtor without that question having been decided?

But they say that they do not believe this Court would apply *Magnolia* here because

"a decision of some kind, either holding the 1907 Ordi-

nance not to be a bar to reorganization (which was done) or invalid as tying the hands of the bankruptcy court forever, was absolutely essential before going forward with the plan" (C. T. A. Br. 31).

Can they claim that the bankruptcy court had jurisdiction to declare the Ordinance invalid?

Do they claim that the bankruptcy court had jurisdiction not only to hold the Ordinance no bar to reorganization, but also to hold that persons not debtors had no liability under that ordinance?

The *Magnolia* case means that where a local question is involved in a controversy within federal jurisdiction, local Courts must decide that question. Whether or not the local question here, our rights against the City and Authority under the 1907 Ordinance, had to be decided to carry out the plan is not important. If that local question had to be decided to conclude the reorganization proceeding, the federal courts had no jurisdiction to decide it, and should have referred it to the Illinois courts for decision. If that local question was not involved at all, *a fortiori* the federal courts had no jurisdiction to decide it. Actually the Circuit Court did not decide that question in its decision affirming the plan. But if it did, it had no jurisdiction to do so, under the foregoing authorities; and there was no basis for the injunction denying our rights against the City and Authority.

There was no jurisdiction to issue such an injunction because the question of our rights against the City and Authority had not been referred to and decided by the Illinois Courts. But going even further, *Harris Trust and Savings Bank* v. *Rys. Co.*, 39 F. (2d) 958, 960, and all of the Illinois decisions on the subject, *Chicago Rys. Co.* v. *Chicago*, 292 Ill. 190, 201, 202; *Chicago City Ry.* v. *Chi-*

cago, 323 Ill. 246, 254; and *Carson, Pirie, Scott & Co.* v. *Parrett,* 346 Ill. 252, 257, indicate that we do have rights against the City and the Authority. These are decisions on local law which are binding upon the Federal Courts. These decisions bring the instant injunction squarely within *In Re Diversey Building Corp.,* 86 F. (2d) 456, 457, 458, and *In Re Nine North Church Street, Inc.,* 82 F. (2d) 18, holding that a bankruptcy court is without jurisdiction to modify or extinguish liabilities of persons other than such debtor (Orig. Br. 39, 40, 41). The injunction here was issued directly in the teeth of all of the law upon the subject. This exposes the error in respondents' argument that no conflict with local decisions was involved (C. T. A. Br. 32).

But respondents argue that we are not third party beneficiaries, that our rights under the ordinance "are at most such remote interests as every bondholder might have in contracts in which his corporation is the promisee, • • • that the *Parrett* case and the law of third party contracts obviously do not apply to the 1907 Ordinance" because "it is fundamental to such a contract that performance move directly to the third party beneficiary" (C. T. A. Br. 32). Various quotations from Williston follow (C. T. A. Br. 32, 33). Is this Court going to decide those questions now by denying this petition?

Passing the non-federal character of these questions, a more typical example of at least a third party promise could scarcely be found. Petitioner Cole and his family held bonds of Chicago Traction. To induce him and others to participate in the 1907 reorganization, the Ordinance was passed. As we pointed out (Orig. Br. 16), the Ordinance was not to be effective unless and until he and others gave up their Chicago Traction securities and accepted the

Series B bonds and participating securities here involved. (This would be clearer if the ordinance was in the record.) That the Ordinance constituted a direct promise to him and those others is evident from its terms as Judge Wilkerson pointed out when he said that it manifested *"a clear intention* not only to provide terms and conditions covering the City's consent to the use of City streets during the grant but also *to provide assurance legally obligatory upon the City, for the protection of the investment"* (Orig. Br. 16). Now the ordinance has been repeatedly held to be a contract between the City and the Railways (*Chicago City Ry. Co.* v. *Chicago*, 323 Ill. 245). We claim also that it was a contract between the City and "those persons who gave up their security and took B bonds upon the faith of said ordinance" (Orig. Br. 17). That question has never been decided by any Illinois Court, but will be if the injunction is relaxed. But in any event it was passed for our direct benefit, and we acted in reliance thereon. From it we received the faith and assurance of the City. If we didn't receive that there was no purpose in its passage and no point in our tendering the securities we then had and accepting those we now hold.

Now the instant plan contemplated "a release of claims against the City of Chicago under any ordinance or otherwise, in consideration of the release by the City of certain claims against the trustees" (C. T. A. Br. 6). And now the claim is that that release to the City discharged any and all liabilities of the City under that ordinance contract and that the Court could jurisdictionally so declare. That this argument is unsound is clear from the very authority they cite, for in 2 Williston on Contracts (Rev. Ed.), pp. 1144, 1145, Sec. 397, *Discharge or variation of the promise — creditor beneficiary*, appears the following:

"The creditors' right is purely derivative, and if

> the debtor no longer has a right against the promisor the creditor should have none. A qualification is made in the Restatement of Contracts, 'A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if, (a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation, and (b) the promisee's action is not a fraud on creditors.' Comment a of the same section of the Restatement reads: 'The beneficiary is justified in relying on the promise and it is immaterial whether he learns of it from the promisor, the promisee or a third party. If there is a material change of position in reliance on the promise, the change of position precludes discharge or variation of the contract without his consent.'"

That we materially changed our position in reliance on the promise before the attempted discharge or variation of the ordinance contract and that we never consented thereto cannot be questioned. As a matter of fact, the promise here did not become effective until we had changed our position in reliance thereon (special conditions, Sec. 1(a)(e), Ordinance, not in record, but referred to, Orig. Br. 16).

But in spite of the foregoing and the absence of the Ordinance in the record, respondents say (C. T. A. Br. 33):

> "But in the 1907 ordinance the performance, if any, under Section 23, moved only to the promisee—Chicago Railways Co. Nowhere is there even a hint that any performance of any kind was to be rendered by the City of Chicago to the B bondholders."

If this were true, which it is not, of what value was the Ordinance to us? We gave up our investment, not Chicago Railways. We asked this same question beginning

on page 43 of the Original Brief, and the Court will observe that we received no answer.

Therefore, we respectfully submit that respondents have utterly failed to answer our Points 4 and 5.

Conclusion.

If one were to entirely ignore the procedural aspects of the appeal accorded petitioners, the fact remains that the effect of the injunctive order is to preclude petitioners under penalty of criminal contempt from determining in the State Court rights and liabilities created by a local ordinance. This is justified upon the premise that those rights and liabilities were determined in the reorganization proceeding. The effect of the alleged determination is to compose, extinguish or modify liabilities of persons other than the bankrupt—persons who never tendered their estate to the bankruptcy court. If this could be done, certainly respondents would cite authority, but they cite none. On the other hand, *Re Diversey Building Corp.*, 86 F. (2d) 456 (C. T. A. Br. 7), and *Re Nine North Church Street, Inc.*, 82 (2d) 186 (Orig. Br. 38, 40) specifically say that a person not a bankrupt "cannot modify his obligations by the reorganization of other insolvents" (Orig. Br. 39).

Further, *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595, 596, says that the federal courts should refrain from passing upon questions of State law until the State Courts have had an opportunity to pass upon them, and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, specifically applies that doctrine to a bankruptcy case. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 80, teaches us that State Court decisions are binding upon the Federal Courts. Yet the effect of the injunction is to ignore State de-

cisions indicating the validity of the cause of action which petitioners desire to prosecute in the State Court. We search respondents' briefs in vain for the citation of any authority which invalidates our position in respect to the matters set forth in this conclusion.

Finally it is said that the case does not fall within Rule 38; that our sole basis for the petition is that we "disagree with the decision of the Circuit Court" and *Magnum Co.* v. *Coty*, 262 U. S. 159, 163, is cited (B. C. Br. 13). We answer by saying that rarely does a case present as many reasons for the invocation of this Court's jurisdiction (Orig. Br. 6, 7, 8). Specifically not one case is cited by them which holds:

(a) That the C. C. A. had jurisdiction to dismiss the appeal (Reasons for Allowance of Writ 1, 2, 8, Orig. Br. 6, 8);

(b) That we were not denied due process (Reasons 3, 4, Orig. Br. 6, 7);

(c) That the Court did not in fact by injunction extinguish or modify the liabilities of persons other than the bankrupt and thereby did not conflict with other decisions (Reason 5, Orig. Br. 7);

(d) That the questions which they claim were decided in the reorganization with respect to the rights and liabilities under the ordinance were federal and not local questions (Reason 6, Orig. Br. 7);

(e) That the questions which they claim were decided in the reorganization were not contrary to State decisions (Reason 7, Orig. Br. 8).

We again respectfully submit that the writ be granted.

Respectfully submitted,

BARNABAS F. SEARS,
WILLIAM RUFUS MORGAN,
Attorneys for Petitioners.

INDEX.

TABLE OF AUTHORITIES.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 492

NAHUM BIRNBAUM, M. J. LUTTERMAN, co-partners, comprising a partnership under the name and style Birnbaum & Co., BIRNBAUM AND CO., a co-partnership, consisting of Nahum Birnbaum and M. J. Lutterman, JAMES A. COLE, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The order of September 30, 1947 dismissing the appeals was not reported. There was no opinion. There are other decisions in this same cause, however, which should be called to the attention of this Court. They are:

The opinion of the Circuit Court of Appeals affirming the orders approving and confirming the plan of reorganization. 160 F. (2d) 59 (January 4, 1947).

This Court's denial of certiorari to review affirmance of the orders of approval and confirmation. 331 U. S. 808 (April 14, 1947).

Dismissal by the Circuit Court of Appeals of present petitioners appeals from the order of sale (April 21, 1947), not reported.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered September 30, 1947. The petition for writ of certiorari was filed December 29, 1947. The jurisdiction of this Court is invoked by petitioners under Section 240 (a) of the Judicial Code (28 U. S. C. Sec. 347 (a)).

STATUTE INVOLVED.

The statute involved is Chapter X of The Bankruptcy Act (11 U. S. C. Secs. 501 *et seq.*).

QUESTIONS PRESENTED.

The questions presented are:

1.

Is an order dismissing a petition to modify an order of sale an appealable order when such petition was filed approximately six months after the entry of the order of sale and when an earlier appeal from the same order of sale had been dismissed and review by certiorari was not attempted?

2.

Is an order of the District Court dismissing a petition to modify an order of sale an appealable order when the order of sale merely had the effect of carrying out a decision of the Circuit Court of Appeals and when the identical points presented by the petition to modify had been

decided adversely to petitioner by that decision of the Circuit Court of Appeals?

3.

Did junior bondholders, who were excluded from any equity in the debtor on their appeals from the approval and confirmation of the plan, have any right to seek modification of the subsequent order of sale which was a necessary step in the execution and carrying out of the plan?

4.

Where appeals which would have upset, or at least indefinitely postponed, the consummation of the plan of reorganization were filed the afternoon of the day before the date set for consummation of the plan, did the Court of Appeals move too hastily in acting on a motion to dismiss within twenty-four hours in order to make possible the consummation of the plan?

5.

Did the court in summarily dismissing appeals from nonreviewable orders, by persons who had no equity in the proceeding and no right to appeal, so far depart from the usual course of judicial proceedings as to call for an exercise of this court's power of supervision?

6.

Did the Circuit Court of Apeals have a sufficient record, together with the matters subject to judicial notice, to enable that court to act on the motion to dismiss?

7.

May the City of Chicago and Chicago Transit Authority, both public municipal corporations, be harassed by permitting suits against them for over 100 million dollars under the 1907 ordinance, when both have done nothing

more than fully to comply with the orders of the District Court, which orders have been affirmed by the Circuit Court of Appeals, with certiorari denied by this court, and when the order of sale has been previously appealed and the appeal dismissed, and when the same points now urged were fully argued and adjudicated in such prior appeals, and further when in reliance upon such prior judicial proceedings the Authority has paid over 75 million dollars for Chicago Surface Lines property, being the value fixed therefor in such proceedings, and when the public on the faith of those proceedings has invested that amount?

STATEMENT OF CASE.

Petitioners' statement of the case wholly fails to present the true picture as it existed at the time they filed their notices of appeal.

September 29, 1947, which they dismiss as just another day in the week, was actually the day before the date set for the long delayed consummation of the reorganization plan of Chicago Surface Lines. On September 30th, Chicago Transit Authority was to turn over the 75 million dollar purchase price, accept the deeds, and start operating the street car lines in Chicago (R. 55, 56).

Petitioners themselves had created the situation of which they now complain by filing their appeals a few hours before the time set for closing this very large transaction.

Another fact not clearly brought out is that petitioners' contentions, if successful, would require the Transit Authority to pay for the properties not $75,000,000 called for by the plan (Chicago Railways' share being $44,475,000) but some $172,000,000 (of which Chicago Railways' share would be some $101,000,000) (160 F. (2d) 59, 66).

Petitioners have tried to portray themselves as summarily deprived of rights, with no opportunity for hearing. Not only had they asserted these same rights on two prior unsuccessful appeals and in an unsuccessful petition for certiorari, but they had, in one of those appeals, approximately six months before, attacked on identical grounds the same order of sale here involved. After that last mentioned appeal was dismissed they filed no petition for certiorari.

This is the background against which petitioners filed their notices of appeal on September 29, 1947.
29, 1947.

Petitioners' position is placed in its true perspective by the following development of the facts:

This case arises out of the reorganization, under chapter X, of the corporations comprising Chicago Surface Lines. The plan of reorganization filed by the City of Chicago, and later adopted by both Chicago Transit Authority, a municipal corporation created for the purpose of acquiring and operating the major mass transportation systems in the metropolitan area of Chicago, and the five bondholders committees representing security holders, was approved and confirmed by the District Court. That plan was the sixth major attempt at reorganization, the other five having failed.

From the orders of approval and confirmation petitioners and others took appeals to the Circuit Court of Appeals, 7th Circuit, which on January 4, 1947, rendered its opinion and judgment affirming the orders.

Both in the District Court and in the briefs in the Circuit Court of Appeals petitioners had urged their rights under the 1907 ordinance in much the same terms as they are now presented in the petition. It was the theory of

respondents and other proponents of the plan that if the 1907 ordinance (which by its terms expired in 1927) retained any vitality and if there were any "rights" under it, those rights belonged to the debtor corporation, the Chicago Railways Company. The plan of reorganization provided for the acquisition by the purchaser, Chicago Transit Authority, or a higher bidder, of all property and property rights of the debtor (except certain retained assets—and no rights under the ordinance were retained). Consequently, if there were any rights remaining under that ordinance, they passed to the purchaser together with the more tangible assets. Moreover, the plan provided for a release of claims against the City of Chicago under any ordinance or otherwise, in consideration of the release by the city of certain claims against the trustees.

The Circuit Court of Appeals in its opinion (*In re* Chicago Railways Company, 160 F. (2d) 59, 66) overruled the position of the petitioners and sustained that of respondents in these words:

> "They [petitioners] argue that the City of Chicago induced investments of capital in the companies, now represented by the outstanding securities. They insist that the ordinance embodies covenants whereby the City reserved the right to purchase the properties and that the City agreed that if the City or its licensee did not purchase the properties on or before February 1, 1927, and if the City should thereafter grant a new ordinance to a licensee, then such licensee should be obligated to pay for the properties, a price computed under the terms of the 1907 ordinance; that the City has granted Transit Authority a new ordinance and is a licensee of the City and is obligated to pay the purchase price provided for by the ordinance. In other words, that the ordinance constituted a binding contract on the part of the City or its licensee to buy the properties at the price of $172,000,000, and *Harris Trust & Savings Bank* v. *Chicago Rys. Co.*, D. C., 39

F. 2d 958, and *Superior Water, Light & Power Co.* v. *City of Superior*, 263 U. S. 125, 44 S. Ct. 82, 68 L. Ed. 204, among other cases are cited. The *Harris Trust* case did not involve the question of whether the City had entered into a contract to buy. In that case the plaintiff sought a decree to direct the receivers to cease paying compensation to the City, and that money in certain funds be paid on the first mortgage bonds. In the *Superior Water* case, the City agreed to purchase. It had entered into a valid contract to buy the water plant. In our case § 20 of the ordinance merely provided that the City reserved to itself the right to purchase, while §§ 21 and 22 made it clear that the City had the right or option, not the obligation, to buy, hence the cases cited are inapplicable. True, § 23 does provide that if, after the expiration of the ordinance, the City should grant a franchise to a new company, the new company shall buy the property upon the terms upon which the City might have purchased. Even so, that fact, under the circumstances in this case, is no reason why the plan should not be approved, since all contingent rights of a debtor pass to its trustee and become part of its estate, *Pollack* v. *Meyer Bros. Drug Co.*, 8 Cir., 233 F. 861, and may be dealt with in Chapter X proceedings."

The quoted words disclose the close similarity of the position taken by petitioners on that appeal to the position now taken by them, and that the argument of respondents was sustained.

After that judgment had been rendered by the Circuit Court of Appeals, the lower court waited two months before entering any further orders. Then, no petition for certiorari having been filed and the mandate not having been stayed, the District Court on March 7, 1947, entered the order of sale which was necessary to carry the plan into execution. The plan contemplated the purchase of the properties by the newly created municipal corporation, Chicago Transit Authority, and that the latter would sell

its revenue bonds (it having no powers of taxation) at the time of and for the purpose of acquiring the properties.

On April 3, 1947, the last day but one allowed by the statute, the present petitioners and others filed their petition for certiorari in this court, seeking to review the aforesaid judgment of January 4, 1947.

On April 4, 1947, petitioners (but not the others) also filed appeals from the order of sale entered March 7, 1947.

The order of sale had set April 22, 1947, as the date of sale. On or before March 22nd, publication had been begun for said sale both in Chicago and New York. These and other surrounding facts are shown by the motion of respondents filed in this Court April 11, 1947, asking that disposition of that petition for certiorari be advanced on account of the public interest (*In re* Chicago Railways Company, etc., Nos. 1200 to 1205), to which reference is made for a more complete statement of the public interest involved in these proceedings.

That motion to advance was presented to this Court April 11th, was allowed April 14th, and the petition for certiorari was denied on the latter date.

Among the principal reasons then relied on by the petition for certiorari are the same grounds now being urged again by petitioners. This will appear by reference to this court's files in the matter of Chicago Railways Company Nos. 1200 to 1205, October term 1946.

After the petition for certiorari had been denied by this court, these respondents on April 16, 1947 presented an emergency motion to the Circuit Court of Appeals showing that the sale was set for April 22nd and that the pendency of the appeals from the order of sale would make necessary a postponement of the sale and a deferment of the

offering of the Transit Authority's bonds. The motion was taken as an emergency motion, and on April 21, 1947, the appeals from the order of sale were dismissed.

Thereafter the sale proceeded; Chicago Transit Authority became the purchaser subject to its ability to market its revenue bonds. Because of the unwillingness of counsel for the bond-buying syndicate to give an opinion approving the bonds while the period for filing a petition for certiorari from the order of April 21, 1947, had not expired, the Authority was forced to defer its offering of bonds until early August of 1947. Then, no petition for certiorari having been filed, the bonds were published for sale. In the meantime, on May 3, 1947, the sale to the Authority had been confirmed by the District Court. From that order no appeal has ever been taken.

Late in August the bonds of the Authority were fully subscribed by the public.

Within a few days thereafter, namely, on September 3, 1947, petitioners filed their petitions, involved in this proceeding, seeking to modify the injunctional provisions of the order of sale entered on March 7, 1947, (R. 2, 19) from which, as above noted, they had previously taken appeals which had been dismissed by the Circuit Court of Appeals.

On September 12th their petitions came on for hearing before the District Court and were disallowed and dismissed (R. 42-44).

The Authority having received commitments for its bonds, it agreed with the Trustees that the sale and delivery of its bonds, the receiving of the money for them, the transfer of the property, and the payment of the purchase price should be made on the last day of the month to simplify bookkeeping problems. The last day of September, 1947, at eleven o'clock A. M., was fixed for the closing.

On the afternoon of September 29, 1947 at approximately two o'clock, petitioners filed their appeals from the orders of September 12th. Those are the appeals here involved.

Respondents, having anticipated the possibility of such last moment appeals, had prepared an emergency motion (R. 54)to docket and dismiss, with suggestions in support thereof, and had also caused the clerk of the District Court to prepare a short record to which was then added a copy of the notices of appeal. Petitioners' attorneys were served with notice to appear before the Circuit Court of Appeals, together with a copy of a motion to dismiss, and the suggestions. This notice was served at 3:15 P.M., and called for their appearance at 4:00 P.M., September 29. They did appear. The court set the matter for argument at 9:30 the next morning, September 30.

In the emergency motion to docket and dismiss, respondents directed the court's attention to the long history of Chicago traction, to the prior failures of reorganization, to the previous decision of that court dealing with the very same matters raised by the petition to amend the order of sale, to the fact that the plan could be consummated only by the sale of the Authority's revenue bonds; showed that the money to purchase the bonds was then in Chicago awaiting the opinion of bond purchasers' counsel, and that the favorable opinion of counsel was contingent upon clearing away all legal obstacles that might threaten the plan or the security behind the bonds; that the closing had been set for eleven o'clock A.M. on September 30; that the appeals were obviously a final desperate effort to thwart the carrying out of the plan; and presented the legal propositions: (a) that under a long line of decisions in this court and in the Circuit Courts of Appeals an order is not appealable which denies a motion or petition, filed after

the expiration of the appeal period, to modify, alter, rehear or set aside a prior order; (b) that the very position taken by petitioners in their petition to modify, namely, that they had separate rights against the City of Chicago and the Authority, had been urged in the appeals from the orders of approval and confirmation; and that said contention had been denied; and (c) that petitioners had been held to have no equity, and having no equity, had no further appealable interest.

The Circuit Court of Appeals gave petitioners' counsel all the time requested by him for the presentation of his position. The matter was also argued by counsel for the Authority. At the conclusion of the arguments the motion to dismiss was allowed (R. 78).

SUMMARY OF ARGUMENT.

1. a. The orders of September 12, 1947 were not appealable for the reason that they dismissed petitions to modify the order of sale which had been entered almost six months before. An unbroken line of authority holds such an order to be non-appealable.

b. The petitioners have no appealable interest. In the decision affirming the approval and confirmation of the plan of reorganization, the Circuit Court of Appeals held these petitioners had no equity in the debtor and were not entitled to participate in the plan. Thereafter petitioners had no appealable interest in orders entered for the purpose of executing the plan.

c. Petitioners' contentions relating to the 1907 ordinance and to the injunction in the order of sale had been decided adversely to them in prior appeals in this same cause. This required the dismissal of the instant appeals.

2. The short record before the Circuit Court of Appeals was in conformity with Federal Rule 75 (j). The short record as filed, together with that court's knowledge of its own prior decisions in this cause, were adequate to show (a) that the orders were not appealable because they merely dismissed petitions to modify an order entered almost six months before; (b) that petitioners had no appealable interest; and (c) that the issue presented by the appeals had been argued and repeatedly adjudicated.

3. The court was justified in acting promptly to dismiss these appeals as they were filed on the afternoon before the day set for the closing of the transactions wherein the Authority was to sell its bonds, obtain the proceeds there-

from and purchase the plan properties. The appeals were calculated to upset, or at least indefinitely postpone, consummation of the plan; and their dismissal was required to protect the power of the federal courts to carry to conclusion a plan of reorganization. The petitioners were on that day as in all previous hearings accorded due process of law.

4. Petitioners' alleged "special and important reasons" for certiorari are based upon a misconstruction of the authorities cited and a complete misconception of the reorganization proceedings.

5. The people residing in the metropolitan area of Chicago, acting through Chicago Transit Authority, have acquired the transportation lines in reliance upon the orders and decisions of the federal courts. The Authority, and the City, should not be harassed by nuisance suits which seek to relitigate issues that have been argued and disposed of repeatedly in the course of the reorganization proceedings.

ARGUMENT.

I.

THE COURT BELOW DID NOT ERR IN DISMISSING APPEALS FROM NON-REVIEWABLE ORDERS BY PETITIONERS WHO HAD NO EQUITY IN THE DEBTORS AND WHO ASSERTED CONTENTIONS WHICH HAD BEEN DECIDED ADVERSELY TO THEM ON THEIR PRIOR APPEALS IN THIS SAME CAUSE.

There were three sound reasons for dismissing the appeals, and each reason alone was sufficient to justify the action of the Circuit Court of Appeals.

A.

Petitioners' Application to Modify the Order of Sale Was a Matter for the Bankruptcy Court's Discretion. A Denial of Their Application Is Not Reviewable.

Petitioners had no right to appeal, since their petitions to modify the order of sale were in the nature of petitions for a rehearing or modification, and denial was discretionary and non-reviewable.

Petitioners' applications of September 3, 1947 before the bankruptcy court were entitled "Petition To Modify Injunctive Provisions Contained In Order of Sale Entered March 7, 1947." Indisputably those applications were in the nature of petitions for rehearing since they showed on their face that they sought to modify an order which had been entered six months before. The bankruptcy court,

in its discretion, denied the petitions and its action was not appealable.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 81 L. Ed. 557, 561.

Steines v. *Franklin County*, 14 Wall. 15, 20 L. Ed. 846.

French v. *Jeffries*, (CCA 7, 1947) 161 F. (2d) 97.

See also: *Pfister* v. *Finance Corp.*, 317 U. S. 144, 149.

This Court in the *Wayne Gas Case* (300 U.S. 131, 137) stated that, while a court of bankruptcy may grant a rehearing and vacate, alter, or amend its decree after the time for appeal has expired, nevertheless:

> "The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal."

The Circuit Courts of Appeals have followed that rule in bankruptcy cases and applied it to petitions to modify similar to the one here involved.

Old Colony Trust Co. v. *Kurm*, (CCA 8, 1943) 138 F. (2d) 394, 395. Petition to modify order directing debtor's trustees to pay interest and principal on bonds to Old Colony (the bond mortgage trustee) by changing the interest rate from 5% to 6%. Petition denied, and appeal therefrom dismissed on ground the denial was not an appealable order. Citing the *Wayne Gas* (300 U.S. 131) and *Pfister* (317 U.S. 144) cases, among others, the court explained its holding as follows:

> "A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion."

Orton v. *Group of Investors,* (CCA 7, 1946) 155 F. (2d) 489, certiorari denied 329 U.S. 734, 91 L. Ed. 44, is remarkably similar to the case at bar in that the reorganization plan there had been approved below and upheld on appeal. Petitioners there, who, like petitioners here, had been eliminated from the reorganization, sought to modify the order of consummation to allow for possible congressional legislation. The motion was denied and the upper court held the order was not appealable citing the *Wayne Case* (300 U.S. 131) and *Old Colony* (138 F. (2d) 394) cases.

Brown v. *Thompson,* (CCA 8, 1945) 150 F. (2d) 171, 172. A petition was filed seeking reimbursement from the debtor's estate for attorney's fees. The petition was denied. Appellant, several months later, filed petitions for reconsideration, which were denied. He appealed and the court held:

> "The orders of July 24, 1943, and of September 28, 1944, being nothing more than denials of petitions for the rehearing or reconsideration of the order of June 30, 1942, were not appealable."

The grounds in the case at bar were far stronger reasons for dismissing the appeals than in the three cases cited last above, because in those cases the "main" order had not previously been appealed, the only appeal being from a denial of a petition to modify or reconsider the main order. But here the main order—the order of sale—had been appealed by these same petitioners (April, 1947) who objected to the same injunctive provisions which they here seek to modify. Their appeals were dismissed (April 21, 1947) and they did not petition for certiorari.

Petitioners argue that the orders in question are appealable under Section 129 of the Judicial Code (28 U.S.C. 227) and cite cases supposedly supporting that theory (Pet. Br. pp 48-49). The purpose of Section 129 was to make

injunctional orders appealable despite the fact that they were not final but interlocutory. That section is not applicable because our objection to the appeals was not based on the interlocutory nature of the orders appealed from but on the ground that the orders were discretionary.

Three of the four cases cited by them are not in point because no question of rehearing was involved. The fourth, the *American Grain* case, 202 F. 202 (Pet. Br. p. 49) involved a question of rehearing on a patent infringement injunction, but is not in point because there was a showing of a new state of facts. That it is not pertinent is made clear by four other cases in which appeals from petitions to rehear or modify injunctional orders were dismissed (two of the cases distinguishing the American Grain case).

Marine Midland Trust Co. v. *Eybro Corp.* (CCA 2, 1932) 58 F. (2d) 165.

Cuno Engineering Corp. v. *Hudson Auto Supply Co.* (CCA 2, 1931) 49 F. (2d) 654.

Magnetic Mfg. Co. v. *Dings Magnetic Separator Co.*, (CCA 7, 1930) 37 F. (2d) 709.

Baker v. *Baker*, (CCA 4, 1897), 83 F. 3.

The following statement of the court in the *Marine Midland* case above (58 F (2d) 165, 167) shows the weakness of petitioners' argument:

> "Inasmuch as the order of April 14, 1931 which granted an injunction in the ancillary suit, was made after a hearing, an appeal from Judge Mack's order of February 4, 1932, denying a motion to vacate it, would only lie in case his order was made, not after what was equivalent to a mere rehearing of the former motion, but upon a new state of facts. This is the effect of our recent decision in *Cuno Engineering Corp* v. *Hudson Auto Supply Co.*, 49 F. (2d) 654. We followed *Baker* v. *Walter Baker & Co.* (C.C.A.) 83 F. 3, and distinguished *American Grain, etc., Co.* v. *Twin City, etc., Co.* (C.C.A.) 202 F. 202.

Furthermore, the order of sale with its injunctive provisions was a necessary step in the execution of the plan pursuant to the mandate of the Circuit Court of Appeals in its judgment affirming the approval and confirmation of the plan. Since that order was in compliance with the mandate, a petition to modify it would not be appealable.

Kresge v. *Winget Kickernick Co.* (C.C.A. 8, 1939) 102 F. (2d) 740.

The above authorities demonstrate that the denial of a petition (especially when filed after the appeal period) to rehear or modify an order, is not appealable; and that the same rule applies to an injunctional order.

We submit that this point alone, which was clearly presented by the short record, fully sustains the action taken by the Circuit Court of Appeals.

B.

Petitioners, on the Appeal From Approval and Confirmation of the Plan, Were Held to Have No Equity in the Debtor. They Therefore Had No Further Appealable Interest in the Proceedings and Had No Right to Maintain the Instant Appeals in the Court Below.

Petitioners are certain B Bondholders of Chicago Railways Company, one of the debtors in the bankruptcy proceedings. They and others had appealed from the bankruptcy court's orders approving and confirming a plan which had excluded them from participation, as required by the absolute priority rule. The Circuit Court of Appeals held that the B bondholders had no equity in the debtors and were not entitled to participate in the plan. *In re Chicago Rys. Co.* (CCA 7, 1947) 160 F. (2d) 59, 67. (Cert. den. 331 U.S. 808). After certiorari was denied by

this Court, petitioners had no further appealable interest as B bondholders in the plan proceedings. The reason for holding that persons in the position of the B bondholders do not have an appealable interest is well stated in *In re Michigan-Ohio Bldg. Corp.* (CCA 7, 1941) 117 F. (2d) 191, 193, where an appeal was dismissed on the Court's own motion, the Court saying:

> "Speaking more specifically, a party has an appealable interest only when his property may be diminished, his burdens increased or his rights detrimentally affected by the order sought to be reviewed. * * * It follows that if his interest or right in and to the subject matter ceases pendente lite, by conveyances, assignment or otherwise, his appealable interest thereby expires * * *."

Since petitioners were held to have no equity in the debtor, the subsequent order of sale relating to the debtor could not have affected them; their property and rights in the debtor were non-existent so long as the plan stood approved and confirmed.

That bondholders or stockholders who have been eliminated from reorganization by valuation of property have no further interest in the debtor's reorganization is shown by *R. F. C.* v. *Denver and Rio Grande Western Railroad Co.*, 328 U. S. 495, 520, 90 L. Ed. 1400, 1416, the Court holding that:

> "It would also follow that the objection of a stockholder, the Missouri Pacific Railroad Company, through its Trustee in reorganization, to a voting trust for future control of the debtor would be ineffective because this stockholder is eliminated from the reorganization by the valuation of the property and allocation of securities."

Petitioners are in a position similar to the stockholder railroad in the above case. They no longer have any ap-

pealable interest in the plan proceedings and cannot object to orders entered in furtherance of the execution and consummation of the plan after its approval and confirmation have been affirmed on appeal.

C.

Petitioners' Contentions Relating to the 1907 Ordinance and to the Injunction in the Order of Sale Were Decided Adversely to Them in Prior Appeals in this Same Cause.

No matter how piously petitioners proclaim that their contentions relating to the 1907 ordinances, if sustained, would not interfere with the Reorganization Plan and have not been passed on before, they cannot disguise either the effect on the Plan or the fact that their claims have been passed on and rejected twice previously by the Circuit Court of Appeals and were urged once before in this Court without success.

Their contentions if sustained would not only affect the approved and confirmed (and consummated) Plan but would disrupt it completely. Instead of the 75 million dollar fair upset price called for by the plan and paid by Chicago Transit Authority on September 30, 1947, petitioners would, if successful, require the City of Chicago or the Transit Authority (in either case, the public) to pay a price of some 172 million dollars for the Surface Lines properties. **Obviously the Circuit Court of Appeals could not have affirmed the approval and confirmation of the plan calling for a purchase price of 75 million dollars without necessarily holding that neither petitioners nor any one else had a right to insist on a purchase price of 172 million dollars.**

The first time petitioners urged these alleged rights be-

fore the Circuit Court of Appeals that court recognized their contentions but ruled against them (160 F. 2d 59, 66), using the words quoted in the statement of facts.

The Circuit Court of Appeals held that whatever the validity of the rights, they belonged to the debtor, passed to the trustee, and could be dealt with by the Plan. And they upheld the Plan which under Article II, G released all claims arising from those alleged rights. This was recognized by petitioners in their petition for certiorari before this Court last April (1947): (Nos. 1200 to 1205)

> "On the contrary, the District Court and the Circuit Court approved the plan which requires under Section G that all rights under the ordinances be released by the trustees to the City of Chicago." (Pet. p. 50)

Petitioners again urged the 1907 ordinance in their unsuccessful appeals from the order of sale. They filed a document listing their objections to a motion to dismiss in which they said:

> "Appellants have always claimed, and claim now, that they have a direct and immediate contractual right, independent of any right of the debtors, against the City and the Transit Authority under the 1907 Traction Ordinances." (Page 5)
>
> "Appellants have always asserted that this obligation was neither an asset or a liability of the debtor but was an *in personam* right of the appellants (and other Series B bondholders) against the City and the Transit Authority." (Page 6)

In advancing the same arguments before this court in their petition for certiorari of April, 1947, they devoted a major part of both their brief and their reply brief to the 1907 ordinance. It is not necessary to set out their contentions in detail since they are clearly apparent in those documents—in their two statements of the case (beginning on pages 3 and 27, respectively), in the "Questions Pre-

sented" (Brief page 18), in the "Reasons Relied on for Allowance of the Writ" (Brief pages 19 and 20), and under points I and II of the "Argument" (Brief pages 41 and 51).

Not only have they advanced their 1907 ordinance arguments many times before, but in appealing from the order of sale, they attacked the same injunctive provision which they now wish to modify. Among their suggestions in opposition (filed April 1947 in the Circuit Court of Appeals) to the motion to dismiss their appeals from the order of sale was the following:

> "Appellants seek an elimination of that provision of the Order of Sale which restrains them from asserting in the state courts, or other proper forum, rights against the Transit Authority, the City, or other persons, those rights never having been adjudicated. And appellants seek modification of the order appealed from so that it should provide that the release of the Consolidated Mortgage and the release or conveyance of rights under the 1907 ordinance shall provide that such releases shall be without prejudice to appellants' claims and rights in the premises." (Pages 10 and 11)

Petitioners apparently seek to go on forever proclaiming their rights under the 1907 ordinance and objecting to the injunction in the order of sale.

For the three reasons outlined, the court below was more than justified in dismissing their appeals.

II.

THE SHORT RECORD BEFORE THE CIRCUIT COURT OF APPEALS SHOWED THE ORDER APPEALED FROM, THE CAPACITY IN WHICH PETITIONERS APPEALED, AND THE NATURE OF THEIR CLAIMS. THOSE MATTERS, TOGETHER WITH THAT COURT'S JUDICIAL KNOWLEDGE OF ITS DECISIONS ON PRIOR APPEALS IN THE SAME CAUSE, CONSTITUTED A SUFFICIENT RECORD ON WHICH TO ACT.

The record certified to the Circuit Court of Appeals contained every item the court needed to pass on the motion to dismiss. This was an exact compliance with Federal Rule 75 (j) which provides in part as follows:

> "(j) Record for Preliminary Hearing in Appellate Court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, * * * the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose."

It has been shown above that the appeals were from non-appealable orders; that petitioners had no equity in the debtors and that the issues raised had been decided against them on prior appeals. Those were the grounds urged for dismissal in the court below and the record certified to that court contained every document necessary to show the existence of each of those incontestable grounds.

The short record contained, among other documents, copies of the petitions to modify and the orders of the

District Court denying the petitions. These documents showed the nature of petitioners' claims under the 1907 ordinance, the fact that they were appealing in their capacity as B Bondholders of Chicago Railways Company, the manner in which they wished to modify the order of sale and the nature of the District Court's order denying the modification.

Taking those documents, together with their knowledge of their own decisions on the former appeals, the judges, two of whom had heard both former appeals, had everything they needed in the way of a record on which to determine the motion to dismiss. It is fundamental that an Appellate Court may take judicial notice of its records on prior appeals between the same parties in the same cause.

Freshman v. *Atkins*, 269 U.S. 121.
McLeod v. *Boone* (CCA 9 1937) 91 F (2d) 71, 72.
Speers Sand & Clay Works v. *Pratt* (CCA 4 1930) 37 F (2d) 571.

Thus, from the record and through judicial knowledge the court had before it the fact that petitioners were seeking to modify an order of sale which had been entered a half year earlier; that the District Court had denied that application, and that the exercise of its discretion by the District Court in that respect was a non-appealable order. That alone was sufficient ground for dismissing the appeals and no additional parts of the record could possibly have avoided that unanswerable reason for dismissal.

The court further knew that it had formerly held petitioners had no equity in the debtor; and that it had decided petitioners' contentions under the 1907 ordinance adversely to them and that petitioners failed to obtain certiorari from this court. Finally, it knew that petitioners had appealed from the order of sale, attacking the injunctive provisions

on the ground that they were thereby prevented from asserting their so-called ordinance rights; that the appeal had been dismissed and no certiorari had been attempted.

Petitioners have protested that the certified record in the court below did not contain their statement of errors required by Rule 9, Title I of the Rules of the Circuit Court of Appeals for the Seventh Circuit. Even assuming that the court could not waive its own rule, such a statement of errors was dispensed with under the specific authority of Federal Rule 75 (j). No error could have been alleged which would have made the non-appealable orders appealable, or given petitioners an equity in the plan properties, or altered the fact that their contentions had been decided against them on prior appeals. Their statement of errors was obviously unnecessary to a decision of the issues raised by the motion to dismiss.

The case (*Lynch* v. *Durfey*, 108 F (2d) 181) which petitioners cite as being in conflict with the instant case on the question of an adequate record is far wide of the mark. There no record at all was certified to the Court of Appeals for the Ninth Circuit and that court was not even able to determine whether appeals had been taken!

Clearly there is no conflicting decision on this point and Federal Rule 75 (j) expressly provides for just such a record in just such a situation as was presented in the court below.

III.

PETITIONERS' APPEAL WAS FILED THE AFTERNOON BEFORE THE DAY SET FOR CONSUMMATION OF THE PLAN. SINCE THE APPEALS WERE GROUNDLESS YET LIKELY TO UPSET OR AT LEAST INDEFINITELY POSTPONE CONSUMMATION, THE COURT BELOW WAS JUSTIFIED IN DISMISSING THEM WITHIN TWENTY-FOUR HOURS.

From the emergency motion to dismiss, the court below knew that petitioners' applications to modify the order of sale were filed in the District Court shortly after subscriptions for the purchase of the entire issue of its bonds had been obtained by the Transit Authority; it was also advised that the bond sale might be defeated by the pendency of these appeals. It also knew that the appeals were filed in the afternoon of September 29, 1947 and that consummation of the plan was scheduled to take place in the District Court on the following morning.

Petitioners make violent objection to the speedy action of the Circuit Court of Appeals. It is submitted that the matters presented under points I and II, above, show clearly why that court was fully justified in proceeding summarily. Petitioners claim that they had no time to present their case adequately. The record reveals that they have presented their case again and again for over two years.

Was it only coincidental that they waited until the day before consummation to file their notices of appeal?

If they were serious in their objection to the injunction in the order of sale, they could have petitioned for cer-

tiorari last spring to review the dismissal of their appeal attacking the same injunctive provisions in the order of sale.

If they actually believed they still had rights, they could have appealed to the District court's discretion much earlier instead of waiting until September 3rd. And they could have filed these appeals shortly after the order of September 12th, instead of waiting until the afternoon before the day set for closing.

The answer, of course, is that they were primarily concerned with blocking the plan. No other conclusion can be reached after considering the tactics they adopted.

Petitioners are in a poor position to claim that their rights under the Fifth Amendment have been violated. That they have had due process of law in full and abundant measure is evident when it is remembered that the 1907 ordinance argument had previously been presented three times in the District Court, twice in the Court of Appeals and once in this Court.

All of that *due process* had preceded the hearing of September 30. Now, after three months, they present nothing in this petition for certiorari that they did not argue before the Circuit Court of Appeals on that day. While they, like respondents, were obliged to move expeditiously, they had full opportunity to and did present their position.

Perhaps few situations have occurred in which a claimant has more often and more persistently pursued a single given theory than have petitioners as shown by this record.

Due process of law does not depend upon the length of time given to argue, particularly when the litigant's position has been fully presented and when the same claim has

repeatedly been passed on by the courts in prior procedures in the same case.

Some mention is made that the emergency motion to docket and dismiss, filed September 29, 1947, was not verified. Many of the facts were known to the Circuit Court of Appeals and appeared from its own records. The representations of fact made in that motion were above the signatures of six sets of attorneys duly admitted to practice in that court. The verified answer which petitioners filed on September 30 did not controvert a single representation of fact that had been made in the emergency motion. Those facts are not now controverted by petitioners.

The prompt action of the Circuit Court of Appeals was not intended to and did not deprive petitioners of a full opportunity to present and argue their position; prompt action was necessary because it was becoming apparent that petitioners were trying to prostitute the appellate processes of the federal courts in an effort to gain by delay that which they had previously been unable to gain on the merits of their case.

IV.

PETITIONERS' REASONS FOR CERTIORARI ARE BASED ON A MISCONSTRUCTION OF THEIR OWN AUTHORITIES AND ON A COMPLETE MISCONCEPTION OF THE REORGANIZATION PROCEEDINGS INVOLVED.

Petitioners have alleged certain purported reasons for certiorari, hoping to come within Supreme Court Rule 38 which sets forth a guide to the "special and important reasons" which call for the exercise of this Court's discretionary power of review. We shall examine each of these

alleged reasons and show that the authorities cited to support them are inapplicable, that the facts of the reorganization proceedings involved have been distorted by petitioners and that in many cases the authorities cited by them to support their "reasons" had been urged by them without success on prior appeals in support of the same claims.

They first claim that the court below has departed from the usual course of judicial proceedings and deprived them of due process of law. This contention is answered in greater detail under Points I, II and III, showing that the record was adequate, was specifically provided for by Federal Rule 75 (j), and showed without possibility of contradiction that the appeals were entirely groundless.

In urging the above contention petitioners seem to believe that a motion to dismiss is a proper method of attack only when it is shown that the "legal requirements of an appeal" have been not complied with (Pet. Br. p. 4). That suggestion is not supported by any authorities and is contrary to the result in *Old Colony Trust Company* v. *Kurm,* 138 F. (2d) 394; *Orton* v. *Group of Investors,* 155 F. (2d) 489 (Cert. Den. 329 U.S. 489, 734); and in *Brown* v. *Thompson,* 150 F. (2d) 171, where non-appealable orders, similar to the orders here, were dismissed upon motion. Rule 75 (j) itself specifically contemplates a motion to dismiss on a short record.

They next contend that the court below decided an important question of federal law that has not been but should be settled by this court. This "important question of federal law" turns out to be an issue as to whether petitioners were denied an opportunity to be heard in the court below (Pet. Br. p. 6). They were given the opportunity in the instant appeal to present their arguments which, in view of the repeated prior hearings on the question, their lack

of equity in the properties and the manifest non-appealability of the orders sought to be reviewed, was the most they could ask. The short time in which petitioners were given to prepare their arguments was far from unusual, considering their dilatory tactics.

Their contention that the decision of the court below is in conflict with the decisions of that and other Circuit Courts of Appeals is based on three cases, which are in no way applicable.

In re Diversey Building Corp. 86 F (2d) 456 (Pet. Br. p. 38) was cited by petitioners in their petition before this court in April, 1947 (p. 51). Aside from the fact that petitioners have been overruled on this contention on prior appeals, the case is not in point. It was there held that a bankruptcy court could not modify obligations of a guarantor who was not in bankruptcy. Petitioners try to apply this case by making the fantastic assumption that the City of Chicago (which in the first place obviously would have no power to do so) guaranteed the B Bondholders that they would get their money back in full even if the companies became insolvent. Nowhere in Section 23 of the ordinance is there a mention of such a guarantee. Any "right" if it still existed, was an asset of the debtor; and was so held by the Circuit Court of Appeals. The plan necessarily dealt with this alleged "right" as with other property of the debtor: otherwise a reorganization would have been perpetually impossible.

In re 9 North Church Street, Inc., 82 F. (2d) 186 (Pet. Br. p. 40), is like the *Diversey* case (86 F 2d 456) and for the same reason, not in point.

Lynch v. *Durfey*, 108 F. (2d) 181 (Pet. Br. p. 8), is cited as being in conflict on the question of the adequacy of the record and is specifically answered under Point II above.

In pretending that the decision below is in conflict with decisions of this court petitioners cite *American Federation*

of Labor v. *Watson*, 327 U.S. 582, *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, and *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478.

This contention completely misconstrues the Circuit Court of Appeals' holding affirming the approval and confirmation of the plan (160 F 2d 59, 66). That court did not hold invalid any state statute or city ordinance. It assumed the validity of the 1907 ordinance (for the purpose of the discussion) but held that such a contingent "right" to the ordinance purchase price, if any existed, was the property of the debtor and could be dealt with in the reorganization proceedings. Thus, even assuming that decisions of this court require that all laws must be construed by the state courts before the federal courts pass on them, the cases cited are inapplicable because the decision here involved was not a matter of state law but of federal bankruptcy law.

We do not believe, however, that this court would apply the *Magnolia Petroleum* case (309 U.S. 478) to the facts here involved if a decision on the validity of the ordinance had been required. In the *Magnolia* case a question of fee simple ownership under the law of Illinois was involved, in a matter concerned with the business of operating the debtor railroad and a decision thereon was not necessary to the carrying out of a reorganization plan. Here, however, a decision of some kind, either holding the 1907 ordinance not to be a bar to reorganization (which was done) or invalid as tying the hands of the bankruptcy court forever, was absolutely essential before going forward with the plan since the ordinance under its bizarre value formula would call for a purchase price of $172,000,000 (of which Chicago Railways' share would be some $101,000,000) while the plan provided for the purchase price of $75,000,000

(of which that debtor's share was $44,475,000). And petitioners, who now deny the necessity of such a holding, specifically urged otherwise on their appeals from the orders of approval and confirmation of the plan.

The *Erie* case (309 U.S. 64) is not in point because, as shown above, it was unnecessary, in upholding and carrying out the plan, to make any decision in conflict with local decisions. Again, this matter has been repeatedly argued in prior appeals.

Petitioners' fifth reason for certiorari purportedly coming under Rule 38 is that the decision below is in conflict with applicable local decisions. With one exception the so-called "applicable decisions" were fully urged by petitioners on prior appeals. The one exception is *Carson, Pirie, Scott & Co.* v. *Parrett*, 346 Ill. 252, by which they seek to apply the contracts doctrine of third party beneficiaries to the B Bondholders whose rights, if any, under the 1907 ordinance, are at most such remote interests as every bondholder might have in contracts in which his corporation is the promisee.

The *Parrett* case and the law of third party contracts obviously do not apply to the 1907 ordinance. It is fundamental to such a contract that performance move directly to the third party beneficiary. In other words the promisor promises the promisee to render performance not to the promisee but to some third person.

2 *Williston on Contracts* (Rev. Ed. 1936) Sec. 347.

Thus in the *Parrett* case (346 Ill. 252) promoters of a corporation promised the bond underwriters that they would pay the corporation's indebtedness for linens furnished by Carson, Pirie, Scott & Co. Thus performance (payment) moved directly to a named third person.

But in the 1907 ordinance the performance, if any, under Section 23, moved only to the promisee—Chicago Railways Co. Nowhere is there even a hint that any performance of any kind was to be rendered by the City of Chicago to the B Bondholders. Where a claimant is neither a promisee nor a person to whom performance is to be rendered, he is a mere incidental beneficiary and has no rights under the contract.

2 *Williston on Contracts* (Rev. Ed. 1936) Sec. 402.

Petitioners presented no acceptable reasons for certiorari in their April 1947 petition, which was denied, although at that time they still had a right to argue the issues. Now they are seeking the same result they sought then—a $172,000,000 purchase price—but their equity in the debtor is gone, their contentions stand overruled, and they are asking review of a non-appealable order. Their cause is totally obliterated.

V.

THE CITY OF CHICAGO AND THE CHICAGO TRANSIT AUTHORITY SHOULD NOT BE HARASSED BY NUISANCE SUITS THAT RAISE PROPOSITIONS OF LAW THAT HAVE PREVIOUSLY BEEN FULLY ARGUED BY PETITIONERS AND DISPOSED OF BY PRIOR ADJUDICATIONS UPON WHICH THE AUTHORITY RELIED IN MAKING ITS PURCHASE.

From the statement of the case as well as from the representations made to this court by respondents in April, 1947 (*In re Chicago Railways Company, etc.*, Nos. 1200-1205), it is apparent that over a period of almost twenty years the District Court has sought in vain to bring about a reorganization of Chicago Surface Lines.

The people of the metropolitan area of Chicago have now acquired these transportation systems. In doing so they have relied upon prior adjudications of the District Court, of the Circuit Court of Appeals, and the necessary implications that follow from the denial by this court of a petition for certiorari. They have further relied upon the decision of the Circuit Court of Appeals in dismissing the prior appeals from the same order of sale, from which decision no certiorari was sought. They have paid 75 million dollars for the properties.

Had Chicago Transit Authority, representing the people, believed that it would have no protection by injunction against subsequent suits by eliminated bondholders which would seek to compel it to pay $100,000,000 more than the plan purchase price, the purchase would never have been made and the plan would never have been carried into effect. By the same reasoning the bond buying public would not have invested millions of dollars of new capital in an effort to put Chicago's transportation finally upon a firm foundation.

The petition here is an attack on the integrity of the federal judicial process. If the decisions of the Federal Courts disposing of issues thoroughly argued and prescribing the terms under which property may be acquired are not final and dependable, then the power to effect a reorganization and compel obedience to its terms has been dissipated.

The interests of the general public in the final solution of the difficult problem of local transportation in Chicago as well as the protection of the effectiveness of the federal judicial power demands the denial of this petition for certiorari.

CONCLUSION.

The properties of Chicago Surface Lines, as well as of the Rapid Transit elevated system, have been acquired by the people of the metropolitan area acting through Chicago Transit Authority.

The alleged rights of these bondholders under the ordinance of 1907 have thrice been fully considered and adjudicated by the Circuit Court of Appeals; first in its principal decision affirming the orders of approval and confirmation of the plan; again in petitioners' appeal from the order of sale and again on September 30, 1947.

Surely nothing remains to be litigated. The only purpose of suits now would be the harassment of this public body by those who would embarrass public operation in the hope that it might eventually fail.

The petitioners have had due process of law; they have had repeated hearings; they have repeatedly been defeated; and their technical situation in the present appeals is completely untenable.

We respectfully ask that the petition be denied.

Respectfully submitted,

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JAMES E. HASTINGS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 492

NAHUM BIRNBAUM, M. J. LUTTERMAN, CO-PARTNERS, COMPRISING A PARTNERSHIP UNDER THE NAME AND STYLE BIRNBAUM & CO., BIRNBAUM AND CO., A CO-PARTNERSHIP, CONSISTING OF NAHUM BIRNBAUM AND M. J. LUTTERMAN, JAMES A. COLE, AND CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE, ETC.,

Petitioners,

vs.

CHICAGO TRANSIT AUTHORITY, ET AL.,

Respondents.

BRIEF OF BONDHOLDERS' COMMITTEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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DATED January 16, 1948.

THE SHORTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

Respondents, Bondholders' Protective Committees, represented in these proceedings the owners of millions of dollars in securities of the companies forming the Chicago Surface Lines. In reliance upon the decrees of the District court and the orders and mandates of courts of review adjudicating adversely to petitioners the contentions now urged with respect to the modification and relaxation of the injunctional provisions of the order of sale of March

7, 1947, respondents and others have at this date acquired valuable vested rights by virtue of the consummation of the plan of reorganization and sale of the local railway systems to the Chicago Transit Authority.

These respondents desire to join in the brief submitted by the Chicago Transit Authority and, without burdening the Court by repeating the questions presented and a further statement, to submit the following by way of supplement:

1. That there is no basis whatsoever for the filing of the *instant* petition is demonstrated by the following facts, all of which occurred in 1947:

(a) On January 4th the Circuit Court of Appeals rendered its opinion and judgment confirming orders of the District court approving and confirming the plan. *In re Chicago Rys. Co., et al.*, 160 F. (2d) 59. The Circuit court, in its decision, held in response to the contentions then made by petitioners, that they were deprived of no contractual rights contained in the 1907 ordinance and that the Bankruptcy court could deal with these alleged rights in the Chapter X proceedings. (See page 66, 160 F. (2d) 59.)

(b) On April 3d, the last day but one allowed for an appeal, these petitioners filed a petition for certiorari in this Court seeking a review of the Circuit court's order of January 4th.

(c) On April 11th these respondents petitioned this court to advance the hearing on the application for certiorari because of the great public interest involved. That motion was allowed and on April 14th this Court denied the petition for certiorari. (Nos. 1200-05, this Court.) Reference to the petition and replies of respondents in that application to this Court will show that the matter of petitioners' asserted rights under the 1907 ordinance were fully discussed and argued.

(d) On March 7th, the District court entered an order of sale setting the sale for April 22d.

(e) On April 4th, the last day but two allowed for

an appeal, these petitioners filed notices of appeal from the order of sale entered March 7th.

(f) On April 16th, these respondents presented an emergency motion to the Circuit Court of Appeals asking dismissal of the appeals.

(g) On April 21st the Circuit Court of Appeals advanced the motion for hearing and on the same day dismissed the appeals.

(h) No petition for certiorari from this order of dismissal was ever filed.

2. The properties were sold to the Authority on April 22d and on May 3d an order confirming the sale was entered by the District court. No appeal has ever been taken from that order.

3. In August the Authority completed the sale of its revenue bonds to the public in the amount of $105,000,000 and it became apparent that the sale would be consummated. At that time all litigation pending in the upper courts had been finally disposed of.

Petitioners, on September 3d, filed petitions in the District court seeking to modify certain provisions of the order of sale entered on March 7th. This was the order from which petitioners had previously appealed and which the Circuit Court of Appeals had dismissed. The petition of September 3d sought to modify the injunctional provisions of the order of sale and raised the same questions as those involved in the previous appeal from the order of sale.

On September 12th the petitions to modify were heard in the District court and orders entered disallowing and dismissing them.

4. Thereupon, all final preparations were made to consummate the sale. Orders of transfer were entered; forms of deed and bills of sale were approved; $105,000,000 was on deposit in Chicago banks; and the District court set

eleven o'clock on the morning of September 30th as the time for the Authority to pay the purchase price in court and receive delivery of the necessary documents of transfer (Tr. 55, 56).

These facts were well known to petitioners.

In a last desperate attempt to prevent consummation of the sale, at about 2:15 P. M. on September 29th, the day before the sale was to be concluded, they filed notices of appeals from the orders of the District court entered on September 12th refusing to modify the order of sale.

Prompt action of an emergency character was necessary to secure a review of these appeals before eleven o'clock on the following morning. Otherwise, the sale could not have taken place and the entire plan would have collapsed.

The plan had received the approval of:

(a) The District court;
(b) City Council of the City of Chicago;
(c) The Illinois Commerce Commission;
(d) Voters of the City of Chicago;
(e) Federal Works Administration;
(f) Securities and Exchange Commission;
(g) Surface Lines securityholders participating in the plan;
(h) The Circuit Court of Appeals for the Seventh Circuit.

This was the first time in twenty years of unceasing effort that such united agreement had been achieved. It would never again be duplicated. Everyone connected with the enterprise knew that if this sale were postponed and this plan failed, the solution of Chicago's long-delayed transportation tangle would be indefinitely postponed and the future growth of the city seriously curtailed. That was the situation which confronted the Circuit Court of

Appeals on the morning of September 30th, when it heard respondents' motion to dismiss the appeals.

The emergency was deliberately created by these petitioners. They waited until the last minute to file the appeal, hoping thus to prevent the sale.

It was an emergency much more acute than that which prompted this Court to advance the hearing on the former application for certiorari and to dismiss it within forty-eight hours from the filing of respondents' answer and without waiting for the record to be printed.

5. The proceedings before the Circuit Court of Appeals complied with all requirements of due process and the rules of Civil Procedure.

The records before the Circuit court were adequate to demonstrate the following at the time the emergency motion to dismiss the appeals came on for hearing: (a) that the asserted rights of petitioners under the so-called 1907 ordinance to institute suits against the City of Chicago and the Chicago Transit Authority had been definitely decided adversely to them in *In re Chicago Rys. Co. et al.*, 160 F. (2d) 59 (certiorari denied by this Court Nos. 1200-05); (b) that the orders of the District court denying the petitions to relax or modify the injunction restraining petitioners from instituting suits against the City of Chicago and the Authority were non-appealable ones; (c) that petitioners, having been found to have no further equity in the debtor, 160 F. (2d) 59, had no appealable interest; (d) that the order of March 7, 1947, containing the injunctional provisions, had been the subject of an appeal by petitioners and that that appeal had been dismissed by the Circuit court and that no application for a writ of certiorari had been made to this Court, and (e) that the points and issues involved in the *instant* appeals and motion to dismiss were clear. Every pro-

cedural and substantive right given petitioners by law and the Rules of Civil Procedure was preserved and safeguarded.

Rules 73 and 75 of the Rules of Civil Procedure prescribe only the procedural steps to be taken in order to procure a review of an order or judgment of a lower court and to perfect an appeal. Rule 75 (j) expressly provides that if prior to the time the complete record on an appeal is settled and certified, as provided in other rules, a party desires to docket the appeal "in order to make in the appellate court a motion for dismissal, * * * the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose." This rule has none of the limitations urged by petitioners. Its language is clear and unambiguous.

Pursuant to Rule 75 (j) respondents brought before the Circuit court on their motion to dismiss the appeals, the following (Tr. 49, 50):

(a) The petitions of the present petitioners filed in the District court moving, in substance, for the entry of an order or orders of the court amending and relaxing the injunctive provisions contained in the order of sale. These petitions fully informed the Circuit court as to the nature, character and extent of the relief prayed (Tr. 19-33; Tr. 2-16).

(b) The three orders of the District court dated September 12, 1947, denying the petitions to modify the injunctive provisions and to set for hearing and adjudication the claims filed in the proceedings by the City of Chicago.

(c) The notices of appeal of petitioners, filed September 29, 1947.

The aforesaid matters were certified by the Clerk of the District court and transmitted to the Appellate court pur-

suant to "designation of record on appeal" filed in the District court by all respondents (Tr. 48-51).

Respondents further filed in the Circuit court (Tr. 55-66) their motion to docket and dismiss the appeals and filed suggestions in support of the said motion (Tr. 59). Petitioners filed suggestions in opposition to appellees' emergency motion to docket and dismiss the appeals (Tr. 67). The Circuit Court of Appeals itself entered an order on September 30, 1947 (Tr. 73) ordering that the appeals be docketed in that court. In addition, there was accorded to both petitioners and respondents time for oral arguments (Tr. 78-101).

While petitioners labor the technical point that the Circuit court could not pass upon the issues before it because the points upon which they relied for a reversal were not before the court, the oral argument clearly shows that full opportunity was given petitioners to state their position in support of their appeals; to read cases which they believed upheld their contentions (Tr. 78), and to point out the errors they felt had been committed below.

During the oral argument counsel for petitioners stated (Tr. 84):

> "* * * This case presents a very simple, narrow question, and a question which we submit that your Honors have never decided. We are seeking here to relax a broad injunctional order of the United States District Court * * *. That order prohibits us from suing anybody. (Tr. 85.) * * * Now, that is all we are seeking to do. We are seeking to relax that injunctional order * * *."

It is evident, therefore, that the nature and purpose of the appeals was made known to the Circuit court, not only by the then record before it and the arguments of counsel, but also by the records of the prior appeals herein-

before set forth and concerning which the court was warranted and justified in taking judicial notice.

The Circuit court was satisfied that the records before it were adequate to permit of passing upon the motion and that was sufficient to satisfy every procedural and jurisdictional requirement. *Karl Kiefer Mach. Co.* v. *United States Bottlers Machinery Co.*, (CCA 7, 1940), 113 F. (2d) 356, wherein the court stated that restriction of the record to relevant material "is to be commended." *Lynch* v. *Durfey*, 108 F. (2d) 181, relied upon by petitioners, is not in point for the reason that on the motion to dismiss an appeal in that case *no* portion of the record had been certified and transmitted to the Appellate court and the court itself held that there had been no compliance with Rule 75 (j) and there was, therefore, nothing before it which permitted of passing upon the motion.

Furthermore, the judges of the Circuit Court of Appeals well understood this whole matter and the questions which had been decided in the prior appeals as a reading of the stenographic report of the argument on the motion to dismiss demonstrates (Tr. 78-101). Judge Evans, Presiding Justice of the Circuit Court of Appeals, made the following comments (Tr. 97):

> "• • • The question for us to determine is how serious are the points and how serious is the emergency. That involves the exercise of judgment by us, and the mere fact that it is a very large amount is not going to control. The very fact that you argue is not going to control. It is a question of how much merit you have and whether it is a case that we should take and look at the grounds and *go through it again* and then go on up to the Supreme Court. The Courts are practical bodies. They have to meet a situation. (Italics ours.)
>
> "This matter has been in the Courts for very many years, and when a party waits until the last minute

before he takes his appeal thinking he is going to block them, the Court can consider that fact along with the other facts.

"He didn't have much time. The fellow was set. He has a serious matter. When somebody walks in and throws a monkey wrench in the machinery and makes no bond to protect anybody from the consequences, we have a right to consider the question and act promptly."

• • • • •

"Judge Evans: In view of the repeated hearings that you had, was there anything to prevent you from taking an appeal on the day the order was made?

Mr. Sears: On what date?

Judge Evans: September 12th.

Mr. Sears: (Tr. 98.) Well, there wasn't. I suppose they possibly could have. I am rather new in the case. I think I got in the case around the 14th.

• • • • •

Judge Sparks: The Court dismissed the appeal on April 21st and you sought to have it reviewed.

Mr. Sears: We sought a review by certiorari?

Judge Sparks: Yes.

Mr. Sears: The record doesn't indicate that.

Judge Sparks: You didn't?

Mr. Sears: That's right, your Honor. That appeal was from the order of sale.

Mr. Schroeder: That is the same order they are talking about."

• • • • •

6. The instant appeal is an attempt again to review the order of sale entered March 7, 1947, from which order an appeal was taken and dismissed. The Court is being asked once more to review that order—that order from which a prior appeal has already been dismissed and from which no petition for certiorari was filed.

The substance of petitioners' contention is that the City of Chicago was obliged to pay the purchase price provided

for in the 1907 ordinance of approximately $172,000,000 and that they have a right to bring suit on that contract. The identical point was made in the original appeal to the Circuit Court of Appeals and in the appeal from the order of sale. Judge Kerner well understood this as appears from the following (Tr. 96):

> "Judge Kerner: Didn't you contend in the original appeal that the city was obliged to pay the purchase price provided by the ordinance. That was your argument. That was your contention.
>
> Mr. Sears: That was one of the points, your Honor.
>
> Judge Kerner: We in our opinion said that was not so."

The action of the Circuit Court in dismissing the appeals finds substantial basis in the authorities. Irrespective of all the contentions of petitioners, the short and complete answer to the entire situation is that the appeals in question were taken from *non-appealable orders.*

Petitioners were not, therefore, in any event entitled to a hearing on the merits. It is evident from the petitions and the oral arguments that the primary aim of petitioners was to seek, either a summary relaxation in the injunctions or a rehearing before the District court, in order to procure modifications thereof. The petitions, whether called petitions to modify a judgment or order or to vacate the same or for a rehearing, all fall within the rule that an order denying them is not an appealable order. In *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 137, 81 L. ed. 557, 561, this Court stated:

> "The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal."

See, also:

Brockett v. *Brockett*, 2 How. 238, 11 L. ed. 251.
French v. *Jeffries*, 161 F. (2d) 97.

7. The Circuit Court of Appeals in its original opinion affirming the order approving the plan of reorganization, 160 F. (2d) 59, held that "the appellants had no equity, there was no value to be protected, and they are not entitled to vote." In this state of the record they have no right or standing at all to make an objection in these proceedings. In other words, their appealable interest had been extinguished. *In re Michigan-Ohio Bldg. Corp.* (C. C. A. 7th), 117 F. (2d) 191.

This is made clear by the following excerpt from the argument before the Circuit Court of Appeals on the motion to dismiss the present appeals (Tr. 86, 87):

> "Judge Kerner: Suppose the record shows you have no equity. What do you say about that? • • •
>
> Judge Evans: I was going to ask the same question. Your right to appear depends upon your showing or a showing that you have an interest here; and if you did not have any interest, although the other cases may be of interest academically, you are not in a position to advance them.
>
> • • • • •
>
> Judge Evans: Well, insofar as this particular action is concerned, the Court denied you that right because you had no interest to protect. Whether they decided correctly or incorrectly is not in question. You took it to the Supreme Court on a writ of certiorari and it was denied.
>
> Now, then, you are just asking us to throw that case aside and proceed as though that was just a waste of paper (Tr. 88).
>
> • • • • •

Judge Evans: You have no more right to get it (the injunction) relaxed than you had a right to come in Court to begin with, because the Court found you lacked interest and you are out. Even if the Court erred in doing so, it becomes final. Do you understand that?"

* * * * *

The sale has now been completely consummated, the purchase price paid, the title to the properties delivered to the purchaser, and the proceeds of the sale are in the process of being distributed to the securityholders entitled thereto under the plan. It is clear that this situation cannot be unscrambled. It is equally clear that all the rights claimed by the petitioners under the 1907 ordinance or otherwise against the properties of the debtor, the City of Chicago, and the Transit Authority have been fully passed upon by the courts.

Furthermore, the action of the District Court in denying the petitions to relax the injunction and the order of the Circuit court in dismissing the instant appeals conformed to the prior opinion and holdings of the Circuit court in 160 F. (2d) 59 and in the prior order of that Appellate court dismissing petitioners' appeal from the sale order of March 7, 1947. There is nothing further to review. Under such circumstances the motion to dismiss the appeals was properly allowed. *In re Chicago, M. St. P. & P. R. Co.*, 145 F. (2d) 299 at 301.

The question as to whether petitioners had any rights under the 1907 ordinance and whether the institution of suits by them against the City of Chicago and the Authority would interfere with the provisions and requirements of the plan of reorganization and the execution thereof were matters solely for the Bankruptcy court to decide.

In determining such matters and in holding that petitioners should be enjoined from filing separate suits which would interfere with the plan and the execution thereof, the Bankruptcy court was exercising exclusive jurisdiction and invaded no powers of state courts. Petitioners' contentions that the matters in question are for the state courts to decide are obviously without merit.

8. This case does not fall within Rule 38 of this Court.

This case presents no question of general importance sufficient to warrant the issuance of the writ here sought. There is not involved any question of lack of uniformity of decisions, nor a conflict with prior decisions of this court or the state courts; nor has the Circuit Court so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. No important question of federal law exists, nor was there a departure from usual or accepted procedure. The sole basis for the petition is that petitioners disagree with the decision of the Circuit court.

The purpose of the writ is not to give the defeated party another hearing. See *Magnum Co.* v. *Coty*, 262 U. S. 159, 163 (1923). The court said:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. * * *"

We, therefore, pray that the petition for certiorari be denied.

Respectfully submitted,

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